

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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General Counsel

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Secretary

August 17, 2006

Doug Slitor, Project Manager
c/o Minerals Management Service
MS 5412
1201 Elmwood Park Blvd.
New Orleans, LA 70123

Re: Comments on Environmental Impact Statement Scoping for the Long Island Offshore
Wind Park Development

Dear Mr. Slitor:

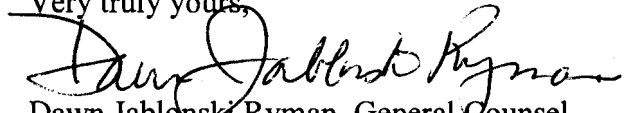
The Staff of the Department of Public Service (DPS) hereby provides an enclosure containing the text of comments previously filed pursuant to a notice published by the US Army Corps of Engineers (Public Notice 2005-00365-L4). This document constitutes our comments concerning the current notice of intent to prepare an Environmental Impact Statement (EIS), invitation for participation by cooperating agencies, and scoping period, regarding the proposed Long Island Offshore Wind Park (LIOWP) development, published in the Federal Register on June 19, 2006. The content of the previously-filed comments remains relevant to the proposed scope of the EIS and to the consideration of mitigation measures.

In addition, DPS recommends consideration in the EIS process of the requirements relating to environmental exhibits and analysis of the transmission facility component of the proposed LIOWP development. The scope of studies should include information to address the requirements for environmental analysis of proposed electric transmission lines specified in Article VII of the New York Public Service Law (PSL). In particular, consideration should be given to the requirements of PSL §§ 122(1) and 126(1)(a) through (d), (f) and (g), as implemented by 16 NYCRR Subpart 85-2 and Parts 86 and 88. A copy of the statute and regulations is attached. Considering the exhibits on environmental impact and alternatives required for an Article VII proceeding in the EIS process should enable and facilitate record development appropriate for the upcoming Article VII proceeding. If the Long Island Power Authority and Long Island Offshore Wind Park, LLC develop and file an Article VII application in concert with the preparation of the federal EIS, the goal of eliminating duplication of state and federal procedures would be furthered.

DPS remains interested in participating as a cooperating agency in the National Environmental Policy Act process. DPS would appreciate receiving guidance documents, ground rules, a schedule, and a description of rights and responsibilities for cooperating agencies specifically concerning the pending review of the LIOWP.

For more information or to discuss DPS's comments, please contact Doug May at the above address, by phone at (518) 474-5368, or by email at Doug_May@dps.state.ny.us.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dawn Jablonski Ryman". The signature is fluid and cursive, with a large initial "D".

Dawn Jablonski Ryman, General Counsel

By: Steven Blow, Assistant Counsel

Enclosures

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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PATRICIA L. ACAMPORA



DAWN JABLONSKI RYMAN

General Counsel

JACLYN A. BRILLING

Secretary

August 5, 2005

US Army Corps of Engineers
New York District
ATTN: Regulatory Branch
LIPA Offshore Wind Park Application
Jacob K. Javits Federal Building
26 Federal Plaza
New York, NY 10278-0090

RE: Preliminary Comments in Reply to Public Notice Number 2005-00365-L4

Dear Sir/Madam:

Enclosed please find the Preliminary Comments of the New York State Department of Public Service relating to studies proposed for assessment under the National Environmental Policy Act of the application for a permit by Long Island Offshore Wind Park, LLC and the Long Island Power Authority to install an offshore wind energy generating facility and submarine electric cables.

Very truly yours,

Steven Blow
Assistant Counsel

enc.

**New York State Department of Public Service
Preliminary Comments to the
US Army Corps of Engineers
Regarding Review of the Proposed
Long Island Offshore Wind Park**

These preliminary comments are submitted by the New York State Department of Public Service (NYSDPS) regarding the application, dated April 26, 2005, for a Department of the Army permit submitted by Long Island Offshore Wind Park, LLC, a subsidiary of Florida Power and Light Energy, and the Long Island Power Authority (LIPA) for a proposed offshore wind electric generating facility and related submarine electric transmission facility (the "Project"). The comments are submitted in reply to the Public Notice by the US Army Corps of Engineers (ACOE) New York District, dated June 9, 2005.¹ The application seeks authorization from the Secretary of the Army to create obstructions to navigation in the navigable waters of the United States, or attached to the seabed of the outer Continental Shelf, and for the discharge of dredged or fill material into the navigable waters of the United States. The ACOE's Notice indicates that comments will be used to assess the environmental impacts of the project. In these preliminary comments, we set forth several matters proposed for further study in order to ensure that a comprehensive environmental assessment is undertaken.

BACKGROUND

NYSDPS has worked with LIPA, the ACOE, the New York State Department of Environmental Conservation (NYSDEC) and other state and federal agencies for several years to evaluate offshore wind projects. NYSDPS is involved in the review of the Project because a Certificate of Environmental Compatibility and Public Need will be sought by LIPA from the New York State Public Service Commission for the electric transmission cable portion of the Project pursuant to Article VII of the New York Public Service Law (NYPSL).² NYPSL Article VII applies, inter alia, to major electric

¹ The July 22, 2005 deadline for the receipt of comments specified in the Notice was subsequently extended to August 12, 2005.

² The Public Service Commission is in the NYSDPS, which is a Department in the State government (NYPSL §§ 3 and 4).

transmission facilities designed to be operated at 125 kV or greater which exceed one mile in length. In determining whether to grant an Article VII Certificate, the Public Service Commission considers the following factors: (1) the basis of the need for the transmission facility; (2) the nature of the probable environmental impact and whether such impacts are minimized considering available technology and economics of alternatives; (3) whether all or part of the facility should be located underground; (4) conformance of the facility to a long-range plan for expansion and reliability of the interconnected power grid; (5) conformance with state and local laws and regulations; and (6) the public interest and associated public concerns and comments.

NYSDPS notes that, as of the date of these preliminary comments, no applications or petitions have been filed with the Public Service Commission regarding the Project. LIPA has indicated that it will file an application for a NYPSL Article VII Certificate in the fourth quarter of 2005. As a point of clarification, by operation of Section 130 of the NYPSL, the Article VII process would supplant the procedural permitting requirements of the NYSDEC and other state and municipal agencies, including those for the excavation and fill of navigable waters, development in Coastal Erosion Hazard Areas, and the issuance of tidal wetlands permits, for the electric transmission cable portion of the Project. Similarly, the Water Quality Certification required by Section 401 of the Federal Clean Water Act for the electric transmission cable portion of the Project would be subject to issuance by the NYSDPS rather than the NYSDEC.

The interest of NYSDPS in providing these preliminary comments is to maximize its coordination with other involved agencies in the earliest environmental assessment phase of the Project. These comments identify certain environmental concerns that need to be evaluated and recommend components of further studies that are necessary to fully characterize and assess the extent of environmental impacts related to the Project. NYSDPS looks forward to providing further input in the scoping phase for the environmental impact statement, if one is required.

Project and Alternatives Analysis

1. The location of the horizontal directional drilling cofferdams are in "nearshore" areas, as defined in 6 NYCRR §505.2(aa) (1000 feet offshore or greater than 15 feet depth at mean low water, whichever is greater) of the Coastal Erosion Hazard Regulations and consequently a prohibited activity, unless a variance is granted by the Public Service Commission pursuant to 6 NYCRR §505.13. Potential alternatives that would minimize exposure to erosion hazards associated with the construction of the cofferdams should be studied.
2. The use of jet-plowing to bury cable within the Bays would appear to have the potential to violate New York State Water Quality Regulations (6 NYCRR §701.20). The South Oyster Bay and Great South Bay have low dilution flows and contain fine sediments with high percentages of organics and toxics from nearby urban uplands. Anaerobic sediments may be encountered. The volume of water needed to jet the cable 6 feet deep is likely to be a significant fraction of the available water in this shallow environment. Significant turbidity, sedimentation, oxygen depression and toxics release might occur. Detailed modeling of the magnitude and duration of jet-plowing impacts should be conducted along with an assessment of sediments. Estimates of disturbance in the assessment contained in the application (p.70) are inadequate since disturbance cannot be assumed to be limited to the trench width. In addition, construction schedule, alternative methods, and mitigation (such as physical plowing or turbidity curtains) should be reviewed for potential to minimize construction impacts.
3. South Oyster Bay and Great South Bay are significant Federal and State coastal habitats (http://www.nyswaterfronts.com/maps_longisland1.asp). The impact on managed fisheries, federal threatened and endangered species, federal species of concern, and populations and habitats of listed New York State threatened and endangered species and species of concern should all be evaluated. Moreover, the impacts on the more common species that comprise the bulk of the Great South Bay ecosystem should be analyzed, including submerged aquatic vegetation. These species are listed in the U.S. Fish and Wildlife Services list of Species of Special Emphasis for the Bays at the following websites:

Great South Bay Complex #14 (FWS) -

http://training.fws.gov/library/pubs5/web_link/text/gsb_form.htm#Great%20South%20Bay

Hempstead - South Oyster Bay Complex #15 (FWS) -

http://training.fws.gov/library/pubs5/web_link/text/hb_sob.htm

Great South Bay Significant Habitat #16 (FWS) -

http://training.fws.gov/library/pubs5/web_link/text/gsb_form.htm

South Oyster Bay Significant Habitat #17 (FWS) -

http://training.fws.gov/library/pubs5/necas/web_link/17_south%20oyster%20bay.htm

Hempstead Bay Significant Habitat #18 -

http://training.fws.gov/library/pubs5/necas/web_link/18_hempstead%20bay.htm

4. The efficacy of the proposed installation of the transmission cable within the periodically dredged Amityville Cut needs further demonstration. The present and future dredging methods used in the Cut should be described in detail to assure that the cable can be safely and reliably operated. A written assurance of cooperation from the agency responsible for the dredging should be a part of the presentation. If there is any doubt about the coexistence of the cable and channel dredging, an alternate route should be evaluated.

5. The transmission cable is proposed to pass through the Long Island South Shore Estuary Reserve. The consistency between the Project and the Comprehensive Management Plan for that Reserve should be assessed, in greater detail.

(<http://www.estuary.cog.ny.us/cmp.html>).

6. The application (attachment page 2) indicates that LIPA solicited wind energy proposals which ranged from 100 to 140 megawatts (MW). The environmental review should assess any increase or incremental impacts associated with a project at the larger end of this range as compared to the Project (scaled at 100 MW), and determine whether a smaller-scale facility would have fewer impacts, while still providing comparable project benefits.

7. The alternative sites analysis (Attachment to the Environmental Questionnaire, page 7) states that "field data will not be collected at any of the alternate sites unless the site is determined to be a better candidate site than the preferred Project location based on the evaluation criteria stated above and economic considerations." The analysis of alternative sites will be an important component of the review and permitting

decisions of agencies with permitting authority. A comparison of available alternatives should be made, addressing relevant criteria and allowing consideration of various attributes, costs and benefits. Decisions as to appropriate relative costs and benefits should be made by ACOE and other permitting authorities, not solely by the developer. Thus, field data, engineering and related environmental and cost analyses used by the developer in its determination of candidate site preferences should be a component of the alternative site comparative analysis.

8. Discussion of the transmission cable in relation to state and local parks (Tab 3, Department of State Coastal Management Program discussion regarding policy number 19 and 20, at page 10) should include the Town of Oyster Bay waterfront park at the southerly terminus of Clocks Blvd. The cable route directly crosses a publicly accessible area of the park, and construction of horizontal directional drill staging and a cable transition structure in the street adjoining the park could temporarily limit access to and use of this resource. In addition, the 138 kV transmission cable is also proposed to traverse the Town of Oyster Bay "Field of Dreams" park opposite the northerly terminus of Clocks Boulevard. That park is currently under construction and will include active recreational facilities and supporting infrastructure.

Visual Impact Analysis

1. This major electric generating project is in a coastal area of scenic and historic significance and intense recreational use. The application should be supported by a fully developed visual analysis conducted pursuant to the ACOE's *Visual Resources Assessment Procedure*. Following such procedure, a comprehensive visual analysis of facility visibility should be prepared, based on definition of landscape characteristics, landscape similarity zones, impacted viewpoint selection, user group definition and characterization, forecast of future conditions, analysis of seasonal variation and comparison of alternate project sites and scales.

2. Landscape characterization should differentiate the various zones within the Jones Beach Island and Fire Island assessment area. Viewpoints should be chosen to

represent the range of zones including distinct areas, perhaps using distinctions such as: fore-shore beachfront - undeveloped waterfront (with open, unobstructed views to surf, sand and sky, as in photos at sheet 15 of 28, but without centering view on trash bins); developed beach-head centers (with infrastructure such as pavilions, concessions, and boardwalks, as in photos at sheets 13, 17 and 19 of 28); residential waterfront (e.g., Oak Island, at Community Center waterfront, not represented in application photographs); scenic highway corridor (open water views from Ocean Parkway, east of Jones Beach, not represented in application photographs); maritime centers (such as marinas at Captree Island and Gilgo Beach, not represented in application photographs); South Bay waterways (including panoramic water level views, with tidal variations, framed by monumental structures including Robert Moses causeway bridges, water towers and lighthouse, not represented in application photographs).

3. Photographs and simulations should be based on a photographer's inventory of professional quality with views framed to characterize the scenic quality of the Project study area.

Effects on Land Use

The upland cable routing analysis should indicate the surrounding and adjacent land uses in the project vicinity, including single family residential, senior citizen apartment residential, neighborhood parks, schools and daycare centers, places of worship, commercial and industrial. Any potential conflicts with current or planned land use should be noted and mitigation should be considered.

CONCLUSION

The NYSDPS urges that the ACOE incorporate the above comments and recommendations in the environmental assessment and review it undertakes as part of its consideration of the Project.

Respectfully submitted,

Dawn Jablonski Ryman, General Counsel
By: Steven Blow, Assistant Counsel
New York State Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-6955

Dated: August 5, 2005

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*** WITH THE EXCEPTION OF CHS. 2, 3, 36, 37, 48, 49, 62 and 99-103 ***

PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Pub Ser Article VII Note (2006)

Pub Ser Article VII Note

HISTORY: Add, L 1970, ch 272, § 2, eff July 1, 1970.

Former Article 7, formerly Article 6, add, L 1921, ch 134, § 69; renumbered Article 7, L 1930, ch 792, § 1; repealed, L 1941, ch 800, § 112, eff April 28, 1941.

Prior Article 7, formerly Article 5, add, L 1910, ch 480; renumbered Article 6, L 1910, ch 673; renumbered Article 7, L 1921, ch 134; renumbered Article 9, L 1930, ch 792, § 2.

NOTES:

Editor's Notes

Laws 1970, ch 272, § 1, eff April 29, 1970, provides as follows:

Section 1. The legislature hereby finds and declares that there is at present and will continue to be a growing need for public utility services including electric, gas, water and steam utilities which will require the construction of major new facilities. It is recognized that such facilities cannot be built without in some way affecting the physical environment where such facilities are located. The legislature further finds that it is essential in the public interest to minimize any adverse effect upon the environment and upon the quality of life of the people of the state which such new facilities might cause. The legislature further finds that present practices, proceedings and laws relating to the location of such utility facilities may be inadequate to protect environmental values, and take into account the total cost to society of such facilities, and have resulted in delays in new construction and increases in costs which are eventually passed onto the people of the state in the form of higher utility rates and the possible threat of the inability of the public and investor-owned utilities to meet

the needs of the people of the state for economic and reliable utility services. Furthermore, the legislature finds that existing provisions of law do not provide adequate opportunity for individuals, groups interested in conservation and the protection of the environment municipalities and other public bodies to participate in timely fashion in the decision to locate a specific major facility at a specific site. The legislature therefore hereby declares that it shall be the purpose of this act to provide a forum for the expeditious resolution of all matters concerning the location of electric and gas transmission facilities presently under the jurisdiction of multiple state and local agencies including the courts of the state, and all matters of state and local law, in a single proceeding to which access will be open to citizens, groups, municipalities and other public agencies to enable them to participate in these decisions.

The legislature further finds that there is a need for the state to control the siting of thermal electric generating plants and other major electric, gas, water and steam facilities within the state in order to minimize any adverse effect on the environment which these facilities may occasion but that the formulation of such legislation requires consultation with, and the active solicitation of the views of, interested persons and public and private bodies concerned with the various aspects of the problem. Therefore, a temporary state commission is hereby established to investigate present siting practices of utility companies with regard to locating major facilities the considerations which should be brought to bear in making such decisions, the appropriate state procedures which should be established to regulate and determine the siting of such facilities and to propose legislation in this area to the legislature at the nineteen hundred seventy-one session.

New York References:

This article referred to in § § 66-g, 120, 121; CLS *ECL* § 8-0111; CLS *EDPL* § 206; CLS *Exec* 802; CLS *Pub A* § § 1014, 1020-s

Research References & Practice Aids:

88 *NY Jur 2d*, *Public Utilities* § 2

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PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Pub Ser § 120 (2006)

§ 120. Definitions

Where used in this article, the following terms, unless the context otherwise requires, shall have the following meanings.

1. "Municipality" means a county, city, town or village in the state.
2. "Major utility transmission facility" means: (a) an electric transmission line of a design capacity of one hundred twenty-five kilovolts or more extending a distance of one mile or more, or of one hundred kilovolts or more and less than one hundred twenty-five kilovolts, extending a distance of ten miles or more, including associated equipment, but shall not include any such transmission line located wholly underground in a city with a population in excess of one hundred twenty-five thousand or a primary transmission line approved by the federal energy regulatory commission in connection with a hydro-electric facility; and (b) a fuel gas transmission line extending a distance of one thousand feet or more to be used to transport fuel gas at pressures of one hundred twenty-five pounds per square inch or more, excluding appurtenant facilities, but shall not include any such transmission line which is located wholly underground in a city or wholly within the right of way of a state, county or town highway or village street as those terms are defined in article one of the highway law and article six of the village law, or which replaces an existing transmission line, including appurtenant facilities, and extends a distance of less than one mile.
3. "Person" means any individual, corporation, public benefit corporation, political subdivision, governmental agency, municipality, partnership, co-operative association, trust or estate.
4. "Appurtenant facilities" means installations (excluding gas compressors) which are merely auxiliary or appurtenant to a fuel gas transmission line such as: valves; drips; measuring and regulating equipment; yard and station piping; cathodic protection equipment; gas cleaning; cooling and

dehydration equipment; residual refining equipment; water pumping; treatment and cooling equipment; electrical and communication equipment; and buildings.

HISTORY: Add, L 1970, ch 272, § 2, eff July 1, 1970.

Another § 120, add, L 1970, ch 269, § 1; renumbered § 117, L 1976, ch 557, § 1, eff Sept 1, 1976.

Former § 120, formerly § 80, add, L 1910, ch 480; renumbered § 120, L 1910, ch 673, § 4; renumbered § 150, L 1930, ch 792, § 2.

Sub 2, amd, L 1972, ch 461, § 1, L 1981, ch 538, § 1, eff July 15, 1981.

Sub 4, add, L 1981, ch 538, § 2, eff July 15, 1981.

NOTES:

Editor's Notes

See 1970 note under Article heading.

New York References:

This section referred to in CLS *EDPL* § 402

Short title and definitions, CLS *High* § § 1 et seq

Streets, sidewalks and public grounds, CLS *Vill* § § 6-600 et seq

Research References & Practice Aids:

17 *NY Jur 2d*, *Carriers* § 79

51 *NY Jur 2d*, *Eminent Domain* § 327

53A *NY Jur 2d*, *Energy* § 122

88 *NY Jur 2d*, *Public Utilities* § 2

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PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

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NY CLS Pub Ser § 121 (2006)

§ 121. Certificate of environmental compatibility and public need

1. No person shall, after July first, nineteen hundred seventy, commence the preparation of the site for the construction of a major utility transmission facility in the state without having first obtained a certificate of environmental compatibility and public need (hereafter in this article called a "certificate") issued with respect to such facility by the commission. The replacement of existing with like facilities, as determined by the commission, shall not constitute the construction of a major utility transmission facility. Any facility with respect to which a certificate is required shall thereafter be built, maintained and operated in conformity with such certificate and any terms, limitations or conditions contained therein. A certificate may only be issued pursuant to this article.

2. A certificate may be transferred, subject to the approval of the commission, to a person who agrees to comply with the terms, limitations and conditions contained therein.

3. A certificate issued hereunder may be amended as herein provided.

4. This article shall not apply to any major utility transmission facility:

a. For which, on or before July first, nineteen hundred seventy an application has been made for a license, permit, consent or approval from any federal, state or local commission, agency, board or regulatory body, in which application the location of the major utility transmission facility has been designated by the applicant;

b. The construction of which has been approved by a municipality or public benefit corporation which has sold bonds or bond anticipation notes on or before July first, nineteen hundred seventy, the proceeds or part of the proceeds of which are to be used in payment therefor; or

c. Over which any agency or department of the federal government has exclusive jurisdiction, or has jurisdiction concurrent with that of the state and has exercised such jurisdiction, to the exclusion of regulation of the facility by the state.

5. Any person intending to construct a major utility transmission facility excluded from this article pursuant to subdivision four may elect to waive such exclusion by delivering notice of such waiver to the commission. This article shall thereafter apply to each major utility transmission facility identified in such notice from the date of its receipt by the commission.

HISTORY: Add, L 1970, ch 272, § 2, eff July 1, 1970.

Former § 121, formerly § 81, add, L 1910, ch 480; renumbered § 121, L 1910, ch 673, § 4; renumbered § 151, L 1930, ch 792, § 2.

NOTES:

Editor's Notes

See 1970 note under Article heading.

NYCRR References:

Certificates of environmental compatibility and public need. *16 NYCRR § § 85-1 et seq*

Research References & Practice Aids:

17 NY Jur 2d, Carriers § 79

51 NY Jur 2d, Eminent Domain § 327

53A NY Jur 2d, Energy § § 123, 125-127

Texts:

Gerrard, Ruzow, Weinberg, *Environmental Impact Review in New York (Matthew Bender) § 8.18[1]*

Case Notes:

Legislature, by enacting provision that applicants for Public Service Commission certification to construct major utility transmission facilities furnish Commission with summary of any studies which have been made regarding environmental impact of project, and description of such studies, did not intend to require that an environmental impact study be prepared and submitted by applicant

for each alternative route proposed for the transmission facility. *Tyminski v Public Service Com.* (1975) 38 NY2d 156, 379 NYS2d 27, 341 NE2d 544.

Where utility filed application for certificate of environmental compatibility and public need authorizing construction of certain high-voltage transmission lines and submitted proposed primary route and alternative routes for lines together with environmental impact statement for primary route as required by statute, information supplied was sufficient to support certification by commission of alternative route despite fact that environmental impact study of alternative route was not made. *Tyminski v Public Service Com.* (1975) 38 NY2d 156, 379 NYS2d 27, 341 NE2d 544.

Regardless of the adequacy of the standards imposed, the Public Service Commission has no authority to condition the certification of environmental compatibility and public need of a power transmission facility upon the requirement that the applicant for such certification offer to purchase or move any house located within 600 feet of the center line of the facility right of way if the owner of the house complains of noise emanating from the facility, since article 7 of the Public Service Law does not authorize the commission to determine what constitutes a nuisance or to provide a remedy for it, an issue which should be determined solely by the courts. *Atwell v Power Authority of New York* (1979, 3d Dept) 67 App Div 2d 365, 415 NYS2d 476, app den (1980) 49 NY2d 797, 426 NYS2d 733, 403 NE2d 456.

Public Service Commission is not required to conduct comparative evaluation of competing pipeline proposals before making determination to issue certificate of environmental compatibility and public need to construct natural gas transmission pipeline. *CNG Transmission Corp. v New York State Public Service Com.* (1992, 4th Dept) 185 App Div 2d 671, 585 NYS2d 916.

Natural gas corporation was entitled to declaratory judgment and injunction to prevent Public Service Commission from regulating corporation's pipeline facilities under CLS Pub Ser Art VII since proceedings under Federal Energy Regulatory Commission, during which corporation had obtained federal permit to construct pipeline within New York State, preempted enforcement of Article VII's requirements with regard to project. *National Fuel Gas Supply Corp. v Public Service Com.* (1990, CA2 NY) 894 F2d 571, cert den (1990) 497 US 1004, 111 L Ed 2d 750, 110 S Ct 3240.

Village seeking to acquire property in town for purposes of public utility service under CLS Gen Mun Art 14-A must use procedures set forth in Eminent Domain Procedure Law; CLS *Vill* § 4-412(3)(1) does not apply. 1999 Ops Atty Gen I 99-44.

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PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

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NY CLS Pub Ser § 121-a (2006)

§ 121-a. Procedures with respect to certain fuel gas transmission lines

1. All persons who intend to construct fuel gas transmission lines as described in this section shall file with the commission for its approval the standards and practices which will be applied to environmental management and construction of all such lines or shall file a certified statement agreeing to construct such lines in accordance with standards and practices on file and approved by the commission.

2. A notice of intention to construct a fuel gas transmission line as described in subdivision two of section one hundred twenty, which extends a distance of less than five miles and which is six inches or less in nominal diameter, shall be filed with the commission and shall contain:

(a) the date on or about which the applicant intends to begin construction of the line;

(b) a brief statement describing and locating the line;

(c) an indication of the approved environmental management and construction standards and practices that will be followed in an effort to minimize or avoid adverse environmental impacts to the maximum extent practicable.

A copy of such notice shall be served on each municipality in which any portion of such line is to be located and proof of service shall accompany the notice filed with the commission.

3. An application to construct a fuel gas transmission line as described in subdivision two of section one hundred twenty, which extends a distance of less than ten miles, other than a line described in subdivision two of this section, shall be filed with the commission and shall contain:

(a) the information required by paragraphs (a), (b), (d) and (f) of subdivision one of section one hundred twenty-two;

(b) the description of the ecosystem, land use, visual and cultural resources which would be affected by the line; and

(c) an indication of the approved environmental management and construction standards and practices that will be followed in an effort to minimize or avoid adverse environmental impacts to the maximum extent practicable.

A copy of such application shall be served on: (i) the department of environmental conservation; (ii) the department of agriculture and markets; and (iii) each municipality in which any portion of such line is to be located; and proof of service shall accompany the application filed with the commission. The commission shall serve a copy of such application on such other person or entities as the commission may deem appropriate. Such action shall be deemed compliance with the applicable provisions of section one hundred twenty-two of this article. The applicant, the commission and those served shall constitute the parties notwithstanding the provisions of section one hundred twenty-four.

4. If the notice or the application filed pursuant to subdivisions two or three of this section respectively does not comply with the requirements of such subdivision, the commission or its designee shall, promptly, but in no event more than fourteen days from the date on which it receives the notice or application, advise the person in writing of noncompliance and how to comply.

5. Any person may file comments on an application with the commission. The record of the certification proceeding under subdivision seven may be limited to the application, any comments filed by the parties and any report prepared by the staff of the department of public service, whether or not it acts as a party.

6. Upon receipt of a notice with respect to a fuel gas transmission line that complies with subdivision two of this section, the commission shall, within thirty days or less, determine whether there is a substantial public interest requiring that the facility be reviewed in accordance with the provisions of subdivision seven of this section. If the commission determines that such review is not required it shall issue a certificate authorizing such construction. Failure to act within such thirty day period shall constitute a certificate for the purpose of this article. If the commission determines that such review is required, the commission shall serve a copy of the notice which shall constitute the application, on such person or entities as the commission may deem appropriate and which shall be deemed compliance with the applicable provisions of section one hundred twenty-two of this article. The applicant and such persons or entities shall constitute the parties, the provisions of section one hundred twenty-four notwithstanding.

7. The commission shall render a decision upon the record within sixty days from the date on which it receives an application complying with subdivision three or within sixty days from the date on which it receives a notice complying with subdivision two on which it has made a determination that review under this subdivision is in the public interest. Where the commission has required a hearing it may extend the time required to render a decision. In rendering its decision on a notice filed pursuant to subdivision two and reviewed under this subdivision, the commission is required to

find and determine only that the construction of a fuel gas transmission line will minimize or avoid adverse environmental impacts to the maximum extent practicable. In rendering its decision on an application filed pursuant to subdivision three, the commission shall make only the determinations required by paragraphs (a), (b), (e), (f) and (g) of subdivision one of section one hundred twenty-six.

HISTORY: Add, L 1981, ch 538, § 3, eff July 15, 1981.

NOTES:

New York References:

This section referred to in § 123

Research References & Practice Aids:

51 *NY Jur 2d, Eminent Domain* § 327

53A *NY Jur 2d, Energy* § § 140-142

Case Notes:

Public Service Commission (PSC) did not err in failing to hold full evidentiary hearing in reviewing application by corporate consumer to construct and operate natural gas pipeline spur since CLS Pub Ser § 121-a(5) allows PSC to limit record in such proceeding; it was proper for PSC to direct that hearing be limited to issue raised by public utility concerning whether there would be financial loss to utility's ratepayers if corporate consumer's application were approved. *Niagara Mohawk Power Corp. v Public Service Com.* (1990, 3d Dept) 164 App Div 2d 502, 563 NYS2d 943, app den (1991) 77 NY2d 808, 570 NYS2d 488, 573 NE2d 576.

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*** WITH THE EXCEPTION OF CHS. 2, 3, 36, 37, 48, 49, 62 and 99-103 ***

PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Pub Ser § 122 (2006)

§ 122. Application for a certificate

1. An applicant for a certificate shall file with the commission an application, in such form as the commission may prescribe, containing the following information: (a) the location of the site or right-of-way; (b) a description of the transmission facility to be built thereon; (c) a summary of any studies which have been made of the environmental impact of the project, and a description of such studies; (d) a statement explaining the need for the facility; (e) a description of any reasonable alternate location or locations for the proposed facility, a description of the comparative merits and detriments of each location submitted, and a statement of the reasons why the primary proposed location is best suited for the facility; and (f) such other information as the applicant may consider relevant or the commission may by regulation require. Copies of all the studies referred to in (c) above shall be filed with the commission and shall be available for public inspection.

2. Each application shall be accompanied by proof of service of:

(a) a copy of such application on

i. each municipality in which any portion of such facility is to be located, both as primarily proposed and in the alternative locations listed. Notice to a municipality shall be addressed to the chief executive officer thereof and shall specify the date on or about which the application is to be filed;

ii. the commissioner of environmental conservation, the commissioner of commerce, the secretary of state, the commissioner of agriculture and markets and the commissioner of parks, recreation and historic preservation;

iii. each member of the legislature through whose district the facility or any alternate proposed in the application would pass;

iv. in the event such facility or any portion thereof is located within its jurisdiction, the Tug Hill commission.

v. in the event such facility or any portion thereof is located within the Adirondack park, as defined in subdivision one of *section 9-0101 of the environmental conservation law*, the Adirondack park agency.

(b) a notice of such application on persons residing in municipalities entitled to receive notice under subparagraph i. of paragraph a. Such notice shall be given by the publication of a summary of the application and the date on or about which it will be filed, to be published under regulations to be promulgated by the commission, in such form and in such newspapers as will serve substantially to inform the public of such application.

3. Inadvertent failure of service on any of the municipalities, persons, agencies, bodies or commissions named in subdivision two may be cured pursuant to regulations of the commission designed to afford such persons adequate notice to enable them to participate effectively in the proceeding. In addition, the commission may, after filing, require the applicant to serve notice of the application or copies thereof or both upon such other persons and file proof thereof as the commission may deem appropriate.

4. An application for an amendment of a certificate shall be in such form and contain such information as the commission shall prescribe. Notice of such an application shall be given as set forth in subdivision two.

HISTORY: Add, L 1970, ch 272, § 2, eff July 1, 1970.

Former § 122, formerly § 105, add, L 1921, ch 134, § 69; renumbered § 122, L 1930, ch 792, § 1; amd, L 1931, ch 689, § 1, L 1935, ch 657, § 1; repealed, L 1941, ch 800, § 112, eff April 28, 1941, with substance transferred to *Rap Tr* § 2.

Prior § 122, formerly § 82, add, L 1910, ch 480; renumbered § 122, L 1910, ch 673, § 4; amd, L 1921, ch 134, § 70; renumbered § 152, L 1930, ch 792, § 2.

Sub 2, par (a), subpar ii, amd, L 1972, ch 827, § 9, L 1975, ch 464, § 28, L 1978, ch 119, § 1 (see 1978 note below), L 1987, ch 362, § 3, eff July 23, 1987.

Sub 2, par (a), subpar iii, add, L 1970, ch 273, § 1; amd, L 1987, ch 362, § 3, eff July 23, 1987.

Former sub 2, par (a), subpar iii, redesignated sub 2, par (a), subpar iv, L 1970, ch 273, § 1, eff July 1, 1970.

Sub 2, par (a), subpar iv, formerly sub 2, par (a), subpar v, so designated sub 2, par (a), subpar iv, L 1987, ch 362, § 2; amd, L 2004, ch 72, § 1, eff May 11, 2004.

Former sub 2, par (a), subpar iv, formerly sub 2, par (a), subpar iii, redesignated sub 2, par (a), subpar (iv) and amd, L 1970, ch 273, § 1; repealed, L 1987, ch 362, § 1, eff July 23, 1987.

Sub 2, par (a), subpar v, formerly sub 2, par (a), subpar vi, so designated sub 2, par (a), subpar v, L 1987, ch 362, § 2, eff July 23, 1987.

Former sub 2, par (a), subpar v, redesignated sub 2, par (a), subpar iv, L 1987, ch 362, § 2, eff July 23, 1987.

Sub 2, par (a), subpar vi, redesignated sub 2, par (a), subpar v, L 1987, ch 362, § 2, eff July 23, 1987.

NOTES:

Editor's Notes

See 1970 note under Article heading.

Laws 1978, ch 119, § 3, provides as follows:

§ 3. This act shall take effect immediately and shall apply to all applications for certificates of environmental compatibility and public need filed after the date on which it shall have become a law.

New York References:

This section referred to in § § 123, 124, 126

Research References & Practice Aids:

17 *NY Jur 2d*, *Carriers* § 79

51 *NY Jur 2d*, *Eminent Domain* § 327

53A *NY Jur 2d*, *Energy* § § 127, 128, 135

Case Notes:

Legislature, by enacting provision that applicants for Public Service Commission certification to construct major utility transmission facilities furnish Commission with summary of any studies which have been made regarding environmental impact of project, and description of such studies, did not intend to require that an environmental impact study be prepared and submitted by applicant for each alternative route proposed for the transmission facility. *Tyminski v Public Service Com.* (1975) 38 *NY2d* 156, 379 *NYS2d* 27, 341 *NE2d* 544.

Where utility filed application for certificate of environmental compatibility and public need authorizing construction of certain high-voltage transmission lines and submitted proposed primary route and alternative routes for lines together with environmental impact statement for primary route as required by statute, information supplied was sufficient to support certification by commission of alternative route despite fact that environmental impact study of alternative route was not made. *Tyminski v Public Service Com.* (1975) 38 *NY2d* 156, 379 *NYS2d* 27, 341 *NE2d* 544.

Determination of Public Service Commission (PSC) to grant applicant certificate of environmental compatibility and public need for construction of natural gas transmission pipeline would not be annulled on ground that petitioner town was not given adequate notice of PSC proceedings, where record established that applicant duly served petitioner with notice of its application under CLS *Pub Ser* § 122(2) and that, although entitled to do so, petitioner did not file CLS *Pub Ser* § 124 notice to become party to proceeding, thereby losing any right to receive ongoing notice of application process. *Wheatfield v State Public Service Com.* (1992, 4th Dept) 185 *App Div 2d* 673, 586 *NYS2d* 60.

Published notices of certification process for Public Service Commission's issuance of certificate of environmental compatibility, authorizing utility to replace 2 electric power lines and modify 6 substations servicing those lines, were sufficient under CLS *Pub Ser* § 122(2)(b), which requires that published notice "substantially...inform the public of such application," where, as required by 16 NYCRR § 85-2.10(c), description of proposed routing was detailed enough to inform public of particular lines that were being upgraded and to inform public that exiting rights-of-way and easements were intended to be used, that there was specified date on or about which filing was to be made, and that copies of application were available for review. *Powerline Coalition v New York State PSC* (1998, 3d Dept) 244 App Div 2d 98, 674 NYS2d 458, app dismd (1998) 92 NY2d 919, 680 NYS2d 458, 703 NE2d 270.

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PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Pub Ser § 123 (2006)

§ 123. [n1]Hearing on application for certificate

1. Upon the receipt of an application with respect to an electric transmission line that complies with section one hundred twenty-two, the commission shall promptly fix a date for the commencement of a public hearing thereon not less than sixty nor more than ninety days after such receipt. Except as otherwise provided in section one hundred twenty-one-a of this article upon the receipt of an application with respect to a fuel gas transmission line that complies with section one hundred twenty-two, the commission shall promptly fix a date for the commencement of a public hearing thereon not less than twenty nor more than sixty days after such receipt. The testimony presented at such hearing may be presented in writing or orally, provided that the commission may make rules designed to exclude repetitive, redundant or irrelevant testimony. The commission shall make a record of all testimony in all contested hearings.

2. On an application for an amendment of a certificate, the commission shall hold a hearing in the same manner as a hearing is held on an application for a certificate if the change in the facility to be authorized would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application.

3. Unless otherwise stipulated by the applicant, a final determination regarding an application for a certificate to construct transmission facilities for interconnection with a wind energy production facility located in the county of Lewis shall be rendered within six months from the date of receipt of a compliant application.

HISTORY: Add, L 1970, ch 272, eff July 1, 1970.

Former § 123, formerly § 106, add, L 1921, ch 134, § 69; amd, L 1921, ch 335, § 4, L 1922, ch 153, § 4; renumbered § 123, L 1930, ch 792, § 1; amd, L 1939, ch 926, § 1, L 1940, ch 568, L 1941, ch 12, L 1941, ch 614; repealed, L 1941, ch 800, § 112, eff April 26, 1941, with substance transferred to *Rap Tr* § 90.

Prior § 123, formerly § 83, add, L 1910, ch 480; renumbered § 123, L 1910, ch 673, § 4; repealed, L 1919, ch 520, § 5.

Sub 1, amd, L 1981, ch 538, § 3, eff July 15, 1981.

Sub 3, add, L 2002, ch 252, § 1, eff July 30, 2002.

NOTES:

Editor's Notes

See 1970 note under Article heading.

Research References & Practice Aids:

51 *NY Jur 2d*, *Eminent Domain* § 327

53A *NY Jur 2d*, *Energy* § § 127, 129, 132

FOOTNOTES:

[n1] So in original. Does not conform with section heading in schedule of sections.

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PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Pub Ser § 124 (2006)

§ 124. [n1]Parties to certification proceedings

1. The parties to the certification proceedings shall include:

- (a) the applicant
- (b) the department of environmental conservation
- (c) the department of commerce
- (d) the secretary of state.
- (e) the department of agriculture and markets.
- (f) the office of parks, recreation and historic preservation.

(g) where the facility or any portion thereof or of any alternate is to be located within its jurisdiction, the Tug Hill commission.

(h) where the facility or any portion thereof or any alternate is to be located within the Adirondack park, as defined in subdivision one of *section 9-0101 of the environmental conservation law*, the Adirondack park agency.

(i) a municipality entitled to receive notice under paragraph (a) of subdivision two of section one hundred twenty-two, if it has filed with the commission a notice of intent to be a party, within thirty days after the date given in the notice as the date for filing of the application.

(j) any individual resident in a municipality entitled to receive notice under paragraph (a) of subdivision two of section one hundred twenty-two, if he has filed with the commission a notice of intent to be a party, within thirty days after the date given in the published notice as the date for filing of the application.

(k) any domestic non-profit corporation or association, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups or to promote the orderly development of the areas in which the facility is to be located, if it has filed with the commission a notice of intent to become a party, within thirty days after the date given in the published notice as the date for filing of the application.

(l) such other persons or entities as the commission may at any time deem appropriate.

2. The commission shall designate such members of its staff as may be desirable to represent the public interest in such proceedings.

3. Any person may make a limited appearance in the proceeding, entitling such person to file a statement in writing, by filing a copy of such statement within sixty days after the date given in the published notice as the date for filing the application. All papers and matters filed by a person making a limited appearance shall become part of the record. No person making a limited appearance shall be a party or shall have the right to present oral testimony or cross-examine witnesses or parties.

4. The commission may, for good cause shown, permit a municipality entitled to become a party under subdivision one, but which has failed to file the requisite notice of intent within the time required, to become a party, and to participate in all subsequent stages of the proceeding.

5. Notwithstanding the time limits set forth in paragraphs (i), (j) and (k) of subdivision one and in subdivision three of this section, a person shall file the notice or statement described in those subdivisions within fifteen days after the date given in the published notice as the date for filing the application, when the application is one with respect to a fuel gas transmission line as defined in section one hundred twenty.

HISTORY: Add, L 1970, ch 272, § 2, eff July 1, 1970.

Former § 124, formerly § 107, add, L 1921, ch 134, § 69; renumbered § 124, L 1930, ch 792, § 1; amd, L 1932, ch 689, § 1, L 1935, ch 657, § 1, L 1939, ch 477, § 1; repealed, L 1941, ch 800, § 112, eff April 28, 1941, with substance transferred to *Rap Tr* § 91.

Prior § 124, formerly § 84, add, L 1910, ch 480; renumbered § 124, L 1910, ch 673, § 4; amd, L 1919, ch 520, § 6; repealed, L 1921, ch 134, § 71.

Sub 1, par (d), amd, L 1972, ch 827, § 10, L 1975, ch 464, § 29, eff July 24, 1975, with retroactive application to April 1, 1975.

Sub 1, par (e), add, L 1978, ch 119, § 2, eff May 9, 1978.

Former sub 1, par (e), redesignated sub 1, par (f), L 1978, ch 119, § 2, eff May 9, 1978.

Sub 1, par (f), add, L 1987, ch 362, § 4, eff July 23, 1987.

Former sub 1, par (f), formerly sub 1, par (e), add, L 1970, ch 272; designated sub 1, par (f), L 1978, ch 119, § 2; repealed, L 1987, ch 362, § 1, eff July 23, 1987.

Prior sub 1, par (f), add, L 1970, ch 272; redesignated sub 1, par (g), L 1978, ch 119, § 2, eff May 9, 1978.

Sub 1, par (g), formerly sub 1, par (f), add, L 1970, ch 272; redesignated sub 1, par (g), L 1978, ch 119, § 2; amd, L 2004, ch 72, § 2, eff May 11, 2004.

Former sub 1, par (g), redesignated sub 1, par (h), L 1978, ch 119, § 2, eff May 9, 1978.

Prior sub 1, par (g), redesignated sub 1, par (h), L 1973, ch 348, § 3, eff Aug 1, 1973.

Sub 1, par (h), formerly sub 1, par (g), add, L 1973, ch 348, § 3; redesignated sub 1, par (h), L 1978, ch 119, eff May 9, 1978.

Former sub 1, par (h), redesignated sub 1, par (i), L 1978, ch 119, eff May 9, 1978.

Prior sub 1, par (h), redesignated sub 1, par (i), L 1973, ch 348, § 3, eff Aug 1, 1973.

Sub 1, par (i), formerly sub 1, par (g), add, L 1970, ch 372; redesignated sub 1, par (h), L 1973, ch 348, § 3; redesignated sub 1, par (i), L 1978, ch 119, eff May 9, 1978.

Former sub 1, par (i), redesignated sub 1, par (j), L 1973, ch 348, § 3, eff Aug 1, 1973.

Sub 1, par (j), formerly sub 1, par (i), previously sub 1, par (h), redesignated sub 1, par (i), L 1973, ch 348, § 3; redesignated sub 1, par (j), L 1978, ch 119, eff May 9, 1978.

Former sub 1, par (j), redesignated sub 1, par (k), L 1973, ch 348, § 3, eff Aug 1, 1973.

Prior sub 1, par (j), add, L 1970, ch 272; repealed, L 1970, ch 273, eff July 1, 1970.

Sub 1, par (k), formerly sub 1, par (j), previously sub 1, par (i), redesignated sub 1, par (j), L 1973, ch 348, § 3; redesignated sub 1, par (k), L 1978, ch 119, eff May 9, 1978.

Former sub 1, par (k), redesignated sub 1, par (l), L 1978, ch 119, eff May 9, 1978.

Prior sub 1, par (k), redesignated sub 1, par (j), L 1970, ch 273, eff July 1, 1970.

Sub 1, par (l), formerly sub 1, par (k), previously sub 1, par (j), redesignated sub 1, par (k), L 1973, ch 348, § 3; redesignated sub 1, par (l), L 1978, ch 119, eff May 9, 1978.

Sub 5, add, L 1981, ch 538, § 5, eff July 15, 1981.

NOTES:

Editor's Notes

See 1970 note under Article heading.

Laws 1978, ch 119, § 3, provides as follows:

§ 3. This act shall take effect immediately and shall apply to all applications for certificates of environmental compatibility and public need filed after the date on which it shall have become a law.

Repeal Notes

[1970, ch 273] The matter contained in Public Service Law § 124(1) (j) repealed by this act was inadvertently placed in such section rather than § 122. This act corrects this error.

New York References:

This section referred to in § 121-a

Research References & Practice Aids:

51 *NY Jur 2d, Eminent Domain* § 327

53A *NY Jur 2d, Energy* § § 130, 131

Case Notes:

Under Public Service Law § 126, subds 1 and 2, and Public Service Law § 124, subd 2, Public Service Commission had authority to certify wholly new route for transmission lines proposed by its staff rather than route proposed by utility company. *County of Orange v Public Service Com.* (1974, 3d Dept) 44 App Div 2d 103, 353 NYS2d 916, app gr (1974) 34 NY2d 519 and mod on other grounds (1975) 37 NY2d 762, 374 NYS2d 633, 337 NE2d 141.

Person who is not "party," as defined in § 124, to proceeding on application for certificate of environmental compatibility and public need and who therefore cannot argue entitlement to notice of commission order denying person's application for rehearing is not entitled to commence judicial review proceeding within 30 days as measured from date person purportedly receives notice of order denying application, rather than from date order is actually issued. *Ingham v Public Service Com.* (1986, 2d Dept) 116 App Div 2d 718, 498 NYS2d 25, app den (1986) 68 NY2d 606.

FOOTNOTES:

[n1] So in original. Does not conform with section heading in schedule of sections.

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PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Pub Ser § 125 (2006)

§ 125. Conduct of the hearing

A record shall be made of the hearing and of all testimony taken and the cross-examinations thereon. The rules of evidence applicable to proceedings before a court shall not apply. The commission may provide for the consolidation of the representation of parties, other than governmental bodies or agencies, having similar interests.

HISTORY: Add, L 1970, ch 272, § 2, eff July 1, 1970.

Former § 125, formerly § 108, add, L 1921, ch 134, § 69; renumbered § 125, L 1930, ch 792, § 1; amd, L 1939, ch 478, L 1939, ch 479, § 1; repealed, L 1941, ch 800, § 112, eff April 28, 1941, with substance transferred to *Rap Tr § 91*.

Prior § 125, formerly § 85, add, L 1910, ch 480; renumbered § 125, L 1910, ch 673, § 4; repealed, L 1921, ch 134, § 71.

NOTES:

Editor's Notes

See 1970 note under Article heading.

Research References & Practice Aids:

51 *NY Jur 2d*, *Eminent Domain* § 327

53A *NY Jur 2d*, *Energy* § 132

Case Notes:

Since there was no suggestion that the viewing of proposed and alternate locations by some or all of the members of Public Service Commission, in connection with hearing on environmental compatibility and public need with respect to 65-mile long electric transmission line, was for anything other than the purpose of understanding evidence before it, such action was not prohibited by statute and could not be successfully maintained that such viewing was prejudicial to electric company which did not avail itself of opportunity to object or attend the viewing of which it had notice. *Niagara Mohawk Power Corp. v Public Service Com.* (1976, 3d Dept) 54 App Div 2d 225, 388 NYS2d 155.

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PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Pub Ser § 126 (2006)

§ 126. The decision

1. The commission shall render a decision upon the record either granting or denying the application as filed or granting it upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the commission may deem appropriate. If the commission denies the application, it shall file, with its order, an opinion stating in full its reasons for the denial. Except as provided in subdivision two of this section, the commission may not grant a certificate for the construction or operation of a major utility transmission facility, either as proposed or as modified by the commission, unless it shall find and determine:

(a) the basis of the need for the facility;

(b) the nature of the probable environmental impact;

(c) that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations including but not limited to, the effect on agricultural lands, wetlands, parklands and river corridors traversed;

(d) in the case of an electric transmission line, (1) what part, if any, of the line shall be located underground; (2) that such facility conforms to a long-range plan for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems, which will serve the interests of electric system economy and reliability;

(e) in the case of a gas transmission line, that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line;

(f) that the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder, all of which shall be binding upon the commission, except that the

commission may refuse to apply any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably restrictive in view of the existing technology, or of factors of cost or economics, or of the needs of consumers whether located inside or outside of such municipality.

(g) that the facility will serve the public interest, convenience, and necessity, provided, however, that a determination of necessity made by the power authority of the state of New York pursuant to section ten hundred five of the public authorities law for a major utility transmission facility for which an application has been filed prior to July first, nineteen hundred seventy-eight pursuant to section one hundred twenty-two of this chapter, shall be conclusive on the commission.

2. In the case of an electric transmission line to be constructed by the power authority of the state of New York and located in part under the waters of Long Island Sound and for the remaining part underground, the commission shall make only the findings and determinations required by paragraphs (b), (c) and (f) of subdivision one of this section and, on the basis of such findings and determinations, shall grant, grant in part, or deny the certificate.

3. If the commission determines that the location of all or a part of the proposed facility should be modified, it may condition its certificate upon such modification, provided that the municipalities and persons residing in such municipalities affected by the modification shall have had notice of the application as provided in subdivision two of section one hundred twenty-two.

4. A copy of the order and any opinion issued therewith pursuant to section one hundred twenty-seven shall be served upon each party.

HISTORY: Add, L 1970, ch 272, § 2, eff July 1, 1970.

Former § 126, formerly § 109, add, L 1921, ch 134, § 69; renumbered § 126, L 1930, ch 792, § 1; repealed, L 1941, ch 800, § 112, eff April 28, 1941, with substance transferred to *Rap Tr* § § 44(b), (c), 102.

Prior § 126, formerly § 86, add, L 1910, ch 480; renumbered § 126, L 1910, ch 673, § 4; amd, L 1919, ch 529, § 7, L 1921, ch 134, § 72; renumbered § 153, L 1930, ch 792, § 2.

Sub 1, opening par, amd, L 1984, ch 520, § 1, eff July 24, 1984.

Sub 1, par (c), amd, L 1987, ch 406, § 1, eff July 23, 1987 (see 1987 note below).

Sub 1, par (g), amd, L 1978, ch 760, § 1, eff Aug 7, 1978.

Sub 2, add, L 1984, ch 520, § 2, eff July 24, 1984.

Former sub 2, redesignated sub 3, L 1984, ch 520, § 2, eff July 24, 1984.

Sub 3, formerly sub 2, so designated sub 3, L 1984, ch 520, § 2, eff July 24, 1984.

Former sub 3, redesignated sub 4, L 1984, ch 520, § 2, eff July 24, 1984.

Sub 4, formerly sub 3, so designated sub 4, L 1984, ch 520, § 2, eff July 24, 1984.

NOTES:

Editor's Notes

See 1970 note under Article heading.

Laws 1987, ch 406, § 2, provides as follows:

§ 2. This act shall take effect immediately and shall apply to any application pending on or after such date.

New York References:

This section referred to in § 127

Powers and duties of authority, CLS Pub A § 1005

Research References & Practice Aids:

51 NY Jur 2d, *Eminent Domain* § 327

53A NY Jur 2d, *Energy* § § 133, 134, 142

Texts:

Gerrard, Ruzow, Weinberg, *Environmental Impact Review in New York (Matthew Bender)* § 8.18[1]

Case Notes: 1. In general 2. Substantial evidence

1. In general

Legislature, by enacting provision that applicants for Public Service Commission certification to construct major utility transmission facilities furnish Commission with summary of any studies which have been made regarding environmental impact of project, and description of such studies, did not intend to require that an environmental impact study be prepared and submitted by applicant for each alternative route proposed for the transmission facility. *Tyminski v Public Service Com.* (1975) 38 NY2d 156, 379 NYS2d 27, 341 NE2d 544.

Where utility filed application for certificate of environmental compatibility and public need authorizing construction of certain high-voltage transmission lines and submitted proposed primary route and alternative routes for lines together with environmental impact statement for primary route as required by statute, information supplied was sufficient to support certification by commission of alternative route despite fact that environmental impact study of alternative route was not made. *Tyminski v Public Service Com.* (1975) 38 NY2d 156, 379 NYS2d 27, 341 NE2d 544.

Public Service Law § 126, subd 1(f) does not contravene the home rule provisions of Article 9 of the State Constitution insofar as it authorizes the public service commission to override local laws and regulations which it finds "unreasonably restrictive" with respect to the location of major transmission facilities, nor does Article 7 of the Public Service Law violate due process by permit-

ting publication only by newspaper in a certificate proceeding. *County of Orange v Public Service Com.* (1972, 2d Dept) 39 App Div 2d 311, 334 NYS2d 434, affd (1972) 31 NY2d 843, 340 NYS2d 161, 292 NE2d 303.

Under Public Service Law § 126, subds 1 and 2, and Public Service Law § 124, subd 2, Public Service Commission had authority to certify wholly new route for transmission lines proposed by its staff rather than route proposed by utility company. *County of Orange v Public Service Com.* (1974, 3d Dept) 44 App Div 2d 103, 353 NYS2d 916, app gr (1974) 34 NY2d 519 and mod on other grounds (1975) 37 NY2d 762, 374 NYS2d 633, 337 NE2d 141.

Public Service Commission by imposing, as condition to the construction of 65-mile long electric transmission line, the consolidation of proposed line with existing facilities and the placing of certain existing facilities underground did not constitute a taking of property but simply a condition with which electric company must comply if it wanted to proceed with its plan. *Niagara Mohawk Power Corp. v Public Service Com.* (1976, 3d Dept) 54 App Div 2d 225, 388 NYS2d 155.

A decision by the Power Authority of the State of New York to transmit power from Canada to New York City rather than to construct additional production facilities in southeastern New York State is neither arbitrary nor capricious with respect to costs and environment since the importation of energy from Quebec will accomplish a desirable purpose by eliminating the need for the construction in this State of a polluting baseload plant, either nuclear or fossil fired, and the actual costs will be determined in negotiations which, when held, will be conducted within the constraints of a contractual agreement that compels the parties, in the absence of an agreement as to costs, to exchange energy during periods in which demand is high in New York City and low in Canada, or demand is high in Canada and low in New York City, when highly inefficient gas turbines would otherwise have to be operated in New York State to meet the demand. *Atwell v Power Authority of New York* (1979, 3d Dept) 67 App Div 2d 365, 415 NYS2d 476, app den (1980) 49 NY2d 797, 426 NYS2d 733, 403 NE2d 456.

Although section 128 of the Public Service Law sets out the procedure for judicial review of a Public Service Commission order issued on an application for a certificate of environmental compatibility and public need for a proposed major utility transmission facility, a resolution of such need by the Power Authority of the State of New York (PASNY) is also reviewable in a section 128 proceeding, since, unlike most other utilities applying to the commission for a certificate, PASNY is a State agency with the authority to determine need (*Public Authorities Law*, § 1005), which determination of need is conclusive on the commission (Public Service Law, § 126, subd 1, par [g]) and it would defeat the purpose of article 7 of the Public Service Law to interpret these provisions as to entirely remove from the article the question of need whenever PASNY is the applicant for a certificate, when the provisions are simply intended to avoid the duplication of efforts which would be involved if two State agencies had the power to make the same determination, and the ambiguity which would result should each agency reach an opposite conclusion. *Atwell v Power Authority of New York* (1979, 3d Dept) 67 App Div 2d 365, 415 NYS2d 476, app den (1980) 49 NY2d 797, 426 NYS2d 733, 403 NE2d 456.

While subdivision 1 of section 126 of the Public Service Law authorizes the Public Service Commission to condition the granting of a certificate of environmental compatibility and public need for a power transmission facility upon such terms, conditions, limitations or modifications of the construction or operation of the facility as it may deem appropriate, nothing in the language of the statute suggests that the commission, which has only those powers conferred by statute and

those which are incidental to the exercise of such powers or necessarily implied therefrom, has the authority to order an applicant to participate in a research program after final certification as a condition of such certification; if the commission has doubts concerning the health and safety aspects of a transmission line, it should not grant final certification until those doubts are resolved. Furthermore, if the Legislature intended to vest the commission with such authority, it specifically would have done so as it did in the enactment of subdivision 4 of section 18-a of the Public Service Law, which expressly permits assessment against the Power Authority of the State of New York of the cost of such a research program prior to certification. *Atwell v Power Authority of New York* (1979, 3d Dept) 67 App Div 2d 365, 415 NYS2d 476, app den (1980) 49 NY2d 797, 426 NYS2d 733, 403 NE2d 456.

Under subdivision 1 of section 126 of the Public Service Law, which empowers the Public Service Commission to certify a power transmission line upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the commission may deem appropriate, the commission has the power to condition authorization of a transmission line upon acquisition of a sufficiently wide right of way to protect the public against risks posed by the line, which finding of such risks is amply supported by expert testimony and documentary evidence, since it cannot be said that the determination of the commission, in a field in which it has expertise and is charged with the responsibility of the health and safety of the public, which allows the operation of a needed transmission line while minimizing the likelihood of harm to the public, is arbitrary, capricious, or irrational. *Atwell v Power Authority of New York* (1979, 3d Dept) 67 App Div 2d 365, 415 NYS2d 476, app den (1980) 49 NY2d 797, 426 NYS2d 733, 403 NE2d 456.

State Public Service Commission fully complied with requirements of CLS Pub Ser § 126, as well as spirit and substance of CLS Environmental Conservation Law and CLS NY Const Art XIV § 4, in analyzing need for power transmission project, its probable environmental impacts, and manner in which those impacts could be reduced, where record was replete with testimony and exhibits evincing strong concern for environmental considerations, bulk of administrative law judges' decision underlying commission's determination was devoted to detailed review of environmental factors, and commission further modified proposed route of project in order to minimize any adverse environmental impacts. *Delaney v Public Service Com.* (1986, 2d Dept) 123 App Div 2d 861, 507 NYS2d 471, app den (1987) 70 NY2d 601, 518 NYS2d 1023, 512 NE2d 549 and app den (1987) 70 NY2d 601, 518 NYS2d 1023, 512 NE2d 549.

State Public Service Commission's determination to waive applicability of local laws and ordinances with regard to proposed power transmission project was supported by evidence in record and fully complied with requirement of CLS Pub Ser § 126 where commission properly placed burden of showing that such laws were "unreasonably restrictive" on State Power Authority, power authority overwhelmingly satisfied burden by submitting comprehensive list of local laws and how they would interfere with project, power authority adduced expert testimony as to interference and construction delays that compliance with laws would occasion, lengthy analysis of deleterious effect of local laws was admitted into evidence, and objectors to project failed to submit any evidence to rebut power authority's case. *Delaney v Public Service Com.* (1986, 2d Dept) 123 App Div 2d 861, 507 NYS2d 471, app den (1987) 70 NY2d 601, 518 NYS2d 1023, 512 NE2d 549 and app den (1987) 70 NY2d 601, 518 NYS2d 1023, 512 NE2d 549.

State Public Service Commission did not act arbitrarily in certifying double-circuit power transmission facility instead of proposed single-circuit alternative, despite evidence of somewhat

more adverse impact on environment, where commission's determination was reasonable in light of superior long-term economic benefits of double-circuit facility, improved system reliability, and adoption of line-routing alternatives which avoided sensitive environmental areas. *Delaney v Public Service Com.* (1986, 2d Dept) 123 App Div 2d 861, 507 NYS2d 471, app den (1987) 70 NY2d 601, 518 NYS2d 1023, 512 NE2d 549 and app den (1987) 70 NY2d 601, 518 NYS2d 1023, 512 NE2d 549.

Public Service Commission (PSC) rationally concluded that record of application for approval of construction of underground power cable would not be reopened where (1) request was based on contention that 2 unrelated cable leakages which occurred subsequent to evidentiary hearings constituted "new circumstances," (2) environmental concerns and possibility of leakage had already been considered in evidentiary proceedings, (3) energy needs to area were rapidly reaching critical stage, and (4) order required applicant to file spill prevention containment plan which was subsequently approved by PSC. *East Williston v Public Service Com.* (1989, 2d Dept) 153 App Div 2d 943, 545 NYS2d 750.

Public Service Commission (PSC) did not have jurisdiction to order relocation of proposed gas pipeline terminal metering and regulating facility, notwithstanding that Federal Energy Regulatory Commission (FERC) did not have jurisdiction over facility, since relocation would have conflicted with exclusive jurisdiction of FERC over pipeline itself; PSC did have jurisdiction to waive portions of town zoning ordinance which would not allow construction of facility at federally approved site. *Skyview Acres Coop., Inc. v Pub. Serv. Comm'n* (1990, 2d Dept) 163 App Div 2d 600, 558 NYS2d 972, app dismd without op (1990) 76 NY2d 1017, 565 NYS2d 766, 566 NE2d 1171 and app den (1991) 77 NY2d 805, 568 NYS2d 913, 571 NE2d 83 and app den (1991) 77 NY2d 806, 568 NYS2d 913, 571 NE2d 83.

Public Service Commission did not misapply "public interest" requirement of CLS Pub Ser § 126(1)(g) by failing to make comparative evaluation of competing proposals offered by consumer and public utility for operation of natural gas pipeline spur and by determining that only consumer's proposal was in public interest; statute has no comparative analysis component. *Niagara Mohawk Power Corp. v Public Service Com.* (1990, 3d Dept) 164 App Div 2d 502, 563 NYS2d 943, app den (1991) 77 NY2d 808, 570 NYS2d 488, 573 NE2d 576.

2. Substantial evidence

Ample evidence existed to sustain State Public Service Commission's conclusion that contract between State Power Authority and Canadian public utility would provide dependable source of electrical power, despite "speculative and conclusory arguments to the contrary" by objectors to power transmission project, where breach of contract was extremely unlikely due to mutual economic benefits to both parties and favorable prior course of dealing existed between parties by virtue of performance under 2 other energy contracts. *Delaney v Public Service Com.* (1986, 2d Dept) 123 App Div 2d 861, 507 NYS2d 471, app den (1987) 70 NY2d 601, 518 NYS2d 1023, 512 NE2d 549 and app den (1987) 70 NY2d 601, 518 NYS2d 1023, 512 NE2d 549.

Substantial evidence supported determination by Public Service Commission that transition station in Westchester County should be located at inland site rather than on waterfront where waterfront site would increase need for dredging and blasting, would possibly require closure of harbor and would increase effects on marine environment, while inland site was compatible with existing mixed residential and industrial area, would result in decreased costs and delays, and would have

minimal environmental impact. *New Rochelle v Public Service Com.* (1989, 2d Dept) 150 App Div 2d 441, 541 NYS2d 49, app den (1989) 74 NY2d 610, 546 NYS2d 554, 545 NE2d 868.

Substantial evidence supported determination of Public Service Commission that alternative route which avoided residential and commercial areas was nonetheless not feasible route for underground electric transmission cable where alternative route, as opposed to certified route, would entail significant problems with traffic safety, engineering and construction, it conflicted with state highway policies, and it would create increased delay and costs. *Tuckahoe v Public Service Com.* (1989, 2d Dept) 150 App Div 2d 466, 541 NYS2d 221, app den (1989) 74 NY2d 609, 545 NYS2d 692, 544 NE2d 611.

Determination of Public Service Commission to grant certificate of environmental compatibility and public need to applicant seeking to construct natural gas transmission pipeline was supported by substantial evidence showing that (1) present demand for gas transportation services exceeded capacity of present pipeline system, (2) demand for additional capacity would continue to increase in future, (3) pipeline in question would introduce competition into monopolistic marketplace and thus lower prices to consumers, (4) pipeline would enhance access to diverse markets of natural gas and improve availability and reliability of services, (5) applicant's plan would provide presently unavailable innovative gas pipeline services, and (6) there was strong customer interest in applicant's pipeline. *CNG Transmission Corp. v New York State Public Service Com.* (1992, 4th Dept) 185 App Div 2d 671, 585 NYS2d 916.

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*** WITH THE EXCEPTION OF CHS. 2, 3, 36, 37, 48, 49, 62 and 99-103 ***

PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Pub Ser § 127 (2006)

§ 127. Opinion to be issued with decision

In rendering a decision on an application for a certificate, the commission may issue an opinion stating its reasons for the action taken. If the commission has found that any local ordinance, law, resolution, regulation, or other action issued thereunder or any other local standard or requirement which would be otherwise applicable is unreasonably restrictive pursuant to paragraph b of subdivision one of section one hundred twenty-six, it shall state in its opinion the reasons therefor.

HISTORY: Add, L 1970, ch 272, § 2, eff July 1, 1970.

Former § 127, formerly § 110, add, L 1921, ch 134; renumbered § 127, L 1930, ch 792, § 1; repealed, L 1941, ch 800, § 112, eff April 28, 1941, with substance transferred to *Rap Tr § 103*.

Prior § 127, formerly § 87, add, L 1910, ch 480; renumbered § 127, L 1910, ch 673, § 4; renumbered § 154, L 1930, ch 792, § 2.

NOTES:

Editor's Notes

See 1970 note under Article heading.

New York References:

This section referred to in § 126

Research References & Practice Aids:

51 NY Jur 2d, Eminent Domain § 327

53A NY Jur 2d, Energy § 133

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PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Pub Ser § 128 (2006)

§ 128. Judicial review

1. Any party aggrieved by any order issued on an application for a certificate may apply for a rehearing under section twenty-two within thirty days after issuance of the order and thereafter obtain judicial review of such order in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court of the state in the judicial department embracing the county wherein the proposed facility is located. If such facility is located in more than one judicial department, such proceeding may be brought in any one but only one of such departments. Such proceeding shall be initiated by the filing of a petition in such court within thirty days after the issuance of a final order by the commission upon the application for rehearing, together with proof of service of a demand on the commission to file with said court a copy of a written transcript of the record of the proceeding before it and a copy of its order and opinion, if any. The commission's copy of said transcript, order and opinion, if any, shall be available at all reasonable times to all parties for examination without cost. Upon receipt of such petition and demand, the commission shall forthwith deliver to the court a copy of the record and a copy of its order and opinion, if any. Thereupon the court shall have jurisdiction of the proceeding and shall have power to grant such relief as it deems just and proper, and to make and enter an order enforcing, modifying, and enforcing as so modified, remanding for further specific evidence or findings or setting aside in whole or in part such order. The appeal shall be heard on the record without requirement of reproduction. No objection that has not been urged by the party in his application for rehearing before the commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of fact on which such order is based shall be conclusive if supported by substantial evidence on the record considered as a whole or by information set forth in the opinion. The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All

such proceedings shall be heard and determined by the appellate division of the supreme court and by the court of appeals as expeditiously as possible and with lawful precedence over other matters.

2. The grounds for and the scope of review of the court shall be limited to whether the order of the commission and opinion, if any, is

(a) in conformity with the constitution and the laws of the state and the United States.

(b) supported by substantial evidence in the record or by information properly considered in the opinion.

(c) within the commission's statutory jurisdiction or authority.

(d) made in accordance with procedures set forth in this article or established by rule or regulation of the commission.

(e) arbitrary, capricious or an abuse of discretion.

3. Except as herein provided article seventy-eight of the civil practice law and rules shall apply to appeals taken hereunder.

HISTORY: Add, L 1970, ch 272, § 2, eff July 1, 1970.

Former § 128, formerly § 111, add, L 1921, ch 134, § 69; renumbered § 128, L 1930, ch 792, § 1; repealed, L 1941, ch 800, § 112, eff April 28, 1941, with substance transferred to *Rap Tr* §§ 109, 110.

NOTES:

Editor's Notes

See 1970 note under Article heading.

New York References:

This section referred to in § 129

Proceeding against body or officer, CLS *CPLR* §§ 7801 et seq

Research References & Practice Aids:

4 *NY Jur 2d*, *Appellate Review* § 342

51 *NY Jur 2d*, *Eminent Domain* § 327

53A *NY Jur 2d*, *Energy* §§ 135-138

Case Notes: 1. In general 2. Non-parties 3. Substantial evidence

1. In general

Public Service Commission order authorizing erection of power supports and conductors for a proposed electric transmission line was not final and, hence, was not subject to judicial review as an order granting application for certificate of environmental compatibility and public need where order was limited to clearing and construction and forbade actual transmission of electricity and reserved right to condition operation of facilities on various limitations; it is a final order which is the certificate of environmental compatibility and public need that is reviewable under statute. *Upset, Inc. v Public Service Com.* (1977, 3d Dept) 57 App Div 2d 208, 394 NYS2d 81.

In proceeding on application for certificate of environmental compatibility and public need for construction of electric transmission facilities, hearing examiner did not err in grouping two towns together for limited purpose of testimony of witness, and since he was produced by one town, other town was properly denied right to cross-examine him. *Islip v Public Service Com.* (1977, 2d Dept) 59 App Div 2d 536, 397 NYS2d 17, app den (1977) 43 NY2d 642.

Although section 128 of the Public Service Law sets out the procedure for judicial review of a Public Service Commission order issued on an application for a certificate of environmental compatibility and public need for a proposed major utility transmission facility, a resolution of such need by the Power Authority of the State of New York (PASNY) is also reviewable in a section 128 proceeding, since, unlike most other utilities applying to the commission for a certificate, PASNY is a State agency with the authority to determine need (*Public Authorities Law*, § 1005), which determination of need is conclusive on the commission (Public Service Law, § 126, subd 1, par [g]) and it would defeat the purpose of article 7 of the Public Service Law to interpret these provisions as to entirely remove from the article the question of need whenever PASNY is the applicant for a certificate, when the provisions are simply intended to avoid the duplication of efforts which would be involved if two State agencies had the power to make the same determination, and the ambiguity which would result should each agency reach an opposite conclusion. *Atwell v Power Authority of New York* (1979, 3d Dept) 67 App Div 2d 365, 415 NYS2d 476, app den (1980) 49 NY2d 797, 426 NYS2d 733, 403 NE2d 456.

An administrative determination by the Power Authority of the State of New York (PASNY) of the need for a power transmission line is only reviewable in a proceeding in the Appellate Division of the Supreme Court pursuant to section 128 of the Public Service Law; such determination need not be challenged in a CPLR article 78 proceeding prior to PASNY's application to the Public Service Commission for a certificate of environmental compatibility and need, since the four-month Statute of Limitations (CPLR 217) only begins to run after the proposed route has been approved, easements obtained and construction of the line authorized and it would be violative of the declared purpose of article 7 of the Public Service Law of providing a forum in which a single proceeding, open to citizens, groups, municipalities and other public agencies, can be conducted (L 1970, ch 272, § 1), to countenance delay by permitting each facet of the location and construction of electric and gas transmission facilities to be challenged in article 78 proceedings. *Atwell v Power Authority of New York* (1979, 3d Dept) 67 App Div 2d 365, 415 NYS2d 476, app den (1980) 49 NY2d 797, 426 NYS2d 733, 403 NE2d 456.

A proceeding in the Appellate Division of the Supreme Court pursuant to section 128 of the Public Service Law to review Public Service Commission orders relating to the construction of power transmission lines is specifically excepted from the general provision that CPLR article 78 shall apply to all appeals taken under section 128 (Public Service Law, § 128, subd 1). Conse-

quently, a petitioner seeking such a review may file a petition, together with proof of service of a demand upon the commission to file with the Appellate Division a copy of a written transcript of the record of proceedings before it, and a copy of its order and opinion, serving all papers by mail and completing filing service within 30 days of the commission's denial of reargument, to commence a section 128 proceeding. *Atwell v Power Authority of New York* (1979, 3d Dept) 67 App Div 2d 365, 415 NYS2d 476, app den (1980) 49 NY2d 797, 426 NYS2d 733, 403 NE2d 456.

A challenge to the statutory authority of the Power Authority of the State of New York to construct a power transmission line between Canada and New York State and to transmit through such a line power not generated in this State, unlike a challenge to the right of the authority to declare a need for such a power line, may be brought as an action for declaratory and injunctive relief against continued construction in the Supreme Court, and need not be confined to a proceeding initiating in the Appellate Division by petition in accordance with section 128 of the Public Service Law. *Atwell v Power Authority of New York* (1979, 3d Dept) 67 App Div 2d 365, 415 NYS2d 476, app den (1980) 49 NY2d 797, 426 NYS2d 733, 403 NE2d 456.

"Extraordinary circumstances", which permit court review of objections not raised before the Public Service Commission in a petition for rehearing (Public Service Law, § 128, subd 1), relate not only to the reasons for failure to raise such objections but also to the substance of the objections. Accordingly, the court will consider the issue of whether inadequate clearance heights have been set by the Public Service Commission for a 765-kilovolt power line, thereby enhancing the probability that electric fields surrounding such lines will induce an electric charge injurious to humans, even though petitioner did not raise the issue in its petition for rehearing. *Atwell v Power Authority of New York* (1979, 3d Dept) 67 App Div 2d 365, 415 NYS2d 476, app den (1980) 49 NY2d 797, 426 NYS2d 733, 403 NE2d 456.

Credible expert testimony which supports a Public Service Commission conclusion that established height clearances set for a proposed power transmission line obviate danger to humans except in a highly remote, almost impossible combination of circumstances, dictates that the commission's conclusion be confirmed. *Atwell v Power Authority of New York* (1979, 3d Dept) 67 App Div 2d 365, 415 NYS2d 476, app den (1980) 49 NY2d 797, 426 NYS2d 733, 403 NE2d 456.

Portion of complaints filed directly in Appellate Division pursuant to CLS Pub Ser Art VII, but which sought review of Public Service Commission's approval of particular environmental management and construction plan, would be dismissed where portions of complaints seeking review of certificate of environmental compatibility and public need had been dismissed on other grounds; proceedings solely to review environmental and construction plans could not be commenced in Appellate Division. *Delaware County Citizens Opposed to Powerline Route Alternatives v Public Service Com.* (1986, 3d Dept) 120 App Div 2d 256, 508 NYS2d 715, later proceeding (1986, 3d Dept) 125 App Div 2d 788, 510 NYS2d 23 and app den (1987) 69 NY2d 607, 514 NYS2d 1025, 507 NE2d 321 and app den (1987) 69 NY2d 608, 514 NYS2d 1026, 507 NE2d 322.

Petitions to challenge Public Service Commission certification order which granted certificate of environmental compatibility and public need would be dismissed for failure to comply with 30-day statute of limitations where certification order also prohibited utility from beginning construction until it submitted and obtained approval of environmental management and construction plan and where court actions were filed within 30 days of commission's denial of petitioners' requests for rehearing on later approval of such environmental management and construction plan but several months after issuance of certification order; fact that approval of certification order was made con-

ditional did not make it nonfinal. *Delaware County Citizens Opposed to Powerline Route Alternatives v Public Service Com.* (1986, 3d Dept) 120 App Div 2d 256, 508 NYS2d 715, later proceeding (1986, 3d Dept) 125 App Div 2d 788, 510 NYS2d 23 and app den (1987) 69 NY2d 607, 514 NYS2d 1025, 507 NE2d 321 and app den (1987) 69 NY2d 608, 514 NYS2d 1026, 507 NE2d 322.

Parties were not aggrieved within meaning of CLS Pub Ser § 128, and thus petition insofar as it was asserted in their behalf would be dismissed, where they did not petition for reconsideration of Public Service Commission order which granted certificate of environmental compatibility and public need for underground electric transmission cable, and thus had no standing to seek judicial review of later order which denied application for reconsideration of earlier order. *Tuckahoe v Public Service Com.* (1989, 2d Dept) 150 App Div 2d 466, 541 NYS2d 221, app den (1989) 74 NY2d 609, 545 NYS2d 692, 544 NE2d 611.

It was neither arbitrary nor capricious for Public Service Commission to allow corporate consumer, which was seeking to construct natural gas-fired cogeneration facility, to construct and operate natural gas pipeline spur since (1) there is no policy preference for public utility ownership of cogeneration facilities, (2) there was evidence of economic advantage if corporate consumer were to own and operate pipeline spur, and (3) approval of consumer's application to construct and operate spur was conditioned on spur serving only consumer's cogeneration facility. *Niagara Mohawk Power Corp. v Public Service Com.* (1990, 3d Dept) 164 App Div 2d 502, 563 NYS2d 943, app den (1991) 77 NY2d 808, 570 NYS2d 488, 573 NE2d 576.

Although Public Service Commission's grant of certificate of environmental compatibility, authorizing utility to replace 2 electric power lines and modify 6 substations servicing those lines, was final action subject to review under CLS Pub Ser § 128, it was not final determination of rights of affected landowners and other petitioners, and thus due process was not violated by commission's use of constructive notice by publication where (1) certification was only first of 3 stages in process involving creation of environmental management and construction plan and culminating in offers of purchase and/or institution of condemnation proceedings, (2) names and addresses of affected owners were not reasonably ascertainable at first stage, because final routes were not then known, and (3) individual notice was provided later in process. *Powerline Coalition v New York State PSC* (1998, 3d Dept) 244 App Div 2d 98, 674 NYS2d 458, app dismd (1998) 92 NY2d 919, 680 NYS2d 458, 703 NE2d 270.

2. Non-parties

Person who is not "party," as defined in § 124, to proceeding on application for certificate of environmental compatibility and public need and who therefore cannot argue entitlement to notice of commission order denying person's application for rehearing is not entitled to commence judicial review proceeding within 30 days as measured from date person purportedly receives notice of order denying application, rather than from date order is actually issued. *Ingham v Public Service Com.* (1986, 2d Dept) 116 App Div 2d 718, 498 NYS2d 25, app den (1986) 68 NY2d 606.

Municipality lacked standing to bring CLS Pub Ser § 128 proceeding to review determination of Public Service Commission (PSC) where power authority applied to PSC for approval of construction of underground power cable, authority served municipality with notice of application but municipality did not timely seek party status despite PSC's strong encouragement to participate in proceedings, PSC granted certificate for power line which transversed municipality following hearings which included discussion of environmental concerns, and more than 30 days later, municipal-

ity petitioned PSC to reopen record without first seeking rehearing, on ground that 2 unrelated cable leakages occurring subsequent to evidentiary hearings constituted "new circumstances"; municipality never sought to become party and thus could not be aggrieved party pursuant to CLS *Pub Ser* § 128. *East Williston v Public Service Com.* (1989, 2d Dept) 153 App Div 2d 943, 545 NYS2d 750.

Determination of Public Service Commission (PSC) to grant applicant certificate of environmental compatibility and public need for construction of natural gas transmission pipeline would not be annulled on ground that petitioner town was not given adequate notice of PSC proceedings, where record established that applicant duly served petitioner with notice of its application under CLS *Pub Ser* § 122(2) and that, although entitled to do so, petitioner did not file CLS *Pub Ser* § 124 notice to become party to proceeding, thereby losing any right to receive ongoing notice of application process. *Wheatfield v State Public Service Com.* (1992, 4th Dept) 185 App Div 2d 673, 586 NYS2d 60.

Petition by affected landowners and others for rehearing on Public Service Commission's grant of certificate of environmental compatibility, authorizing utility to replace 2 electric power lines and modify 6 substations servicing those lines, was time barred under CLS *Pub Ser* § 128(1) where petitioners, without ever having sought party status, applied for rehearing over 18 months after date of final approval of certificate. *Powerline Coalition v New York State PSC* (1998, 3d Dept) 244 App Div 2d 98, 674 NYS2d 458, app dismd (1998) 92 NY2d 919, 680 NYS2d 458, 703 NE2d 270.

3. Substantial evidence

There was substantial evidence to support public service commission's finding basis of need for interconnecting lines where such interconnections would greatly improve the reliability of the state's bulk power transfer system, and would assure against power shortages and interruptions by allowing energy to be transferred back and forth from a remote area to an area of particularly high demand. *County of Orange v Public Service Com.* (1974, 3d Dept) 44 App Div 2d 103, 353 NYS2d 916, app gr (1974) 34 NY2d 519 and mod on other grounds (1975) 37 NY2d 762, 374 NYS2d 633, 337 NE2d 141.

Determination granting certificate of environmental compatibility and public need for construction of electric transmission facilities was supported by substantial evidence and not arbitrary, capricious or an abuse of discretion. *Islip v Public Service Com.* (1977, 2d Dept) 59 App Div 2d 536, 397 NYS2d 17, app den (1977) 43 NY2d 642.

Determination of Public Service Commission permitting construction and installation of overhead electric power lines within town was supported by substantial evidence and was not arbitrary, capricious or an abuse of discretion. *Oyster Bay v Long Island Lighting Co.* (1977, 2d Dept) 59 App Div 2d 536, 397 NYS2d 18.

Substantial evidence supported determination by Public Service Commission that transition station in Westchester County should be located at inland site rather than on waterfront where waterfront site would increase need for dredging and blasting, would possibly require closure of harbor and would increase effects on marine environment, while inland site was compatible with existing mixed residential and industrial area, would result in decreased costs and delays, and would have minimal environmental impact. *New Rochelle v Public Service Com.* (1989, 2d Dept) 150 App Div 2d 441, 541 NYS2d 49, app den (1989) 74 NY2d 610, 546 NYS2d 554, 545 NE2d 868.

Substantial evidence supported determination of Public Service Commission that selection of particular site for transition station did not contravene policies embodied in Waterfront Revitalization and Coastal Resources Act (CLS *Exec* § 910 et seq.) where site was not located on waterfront, and it permitted continued development of waterfront in accordance with city's revitalization plans. *New Rochelle v Public Service Com.* (1989, 2d Dept) 150 App Div 2d 441, 541 NYS2d 49, app den (1989) 74 NY2d 610, 546 NYS2d 554, 545 NE2d 868.

Determination of Public Service Commission to grant certificate of environmental compatibility and public need to applicant seeking to construct natural gas transmission pipeline was supported by substantial evidence showing that (1) present demand for gas transportation services exceeded capacity of present pipeline system, (2) demand for additional capacity would continue to increase in future, (3) pipeline in question would introduce competition into monopolistic marketplace and thus lower prices to consumers, (4) pipeline would enhance access to diverse markets of natural gas and improve availability and reliability of services, (5) applicant's plan would provide presently unavailable innovative gas pipeline services, and (6) there was strong customer interest in applicant's pipeline. *CNG Transmission Corp. v New York State Public Service Com.* (1992, 4th Dept) 185 App Div 2d 671, 585 NYS2d 916.

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*** WITH THE EXCEPTION OF CHS. 2, 3, 36, 37, 48, 49, 62 and 99-103 ***

PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Pub Ser § 129 (2006)

§ 129. Jurisdiction of courts

Except as expressly set forth in section one hundred twenty-eight and except for review by the court of appeals of a decision of the appellate division of the supreme court as provided for therein, no court of this state shall have jurisdiction to hear or determine any matter, case or controversy concerning any matter which was or could have been determined in a proceeding under this article or to stop or delay the construction or operation of a major facility except to enforce compliance with this article or the terms and conditions of a certificate issued hereunder.

HISTORY: Add, L 1970, ch 272, § 2, eff July 1, 1970.

Former § 129, formerly § 112, add, L 1925, ch 641, § 1; renumbered § 129, L 1930, ch 792, § 1; amd, L 1931, ch 689, § 1, L 1935, ch 657, § 1; repealed, L 1941, ch 800, § 112, eff April 28, 1941, with substance transferred to *Rap Tr* § 92.

NOTES:

Editor's Notes

See 1970 note under Article heading.

Research References & Practice Aids:

51 *NY Jur 2d*, *Eminent Domain* § 327

53A *NY Jur 2d*, *Energy* § 139

Case Notes:

A CPLR article 78 petition seeking a court order directing various State and local health agencies and the State Department of Environmental Conservation to supervise, regulate and abate an alleged public health nuisance created by a high-voltage transmission line must be dismissed since the Legislature, in giving the Public Service Commission exclusive and continuing jurisdiction over these matters, pursuant to which extensive public hearings have been held on the issues raised by the petitioners, has limited judicial review of the commission's decisions to the Appellate Division and deprived inferior courts of the authority to review any matter that was or could have been determined in a proceeding under article 7 of the Public Service Law (Public Service Law, § 129); therefore, petitioners are attempting to raise issues in a Supreme Court proceeding that properly belong before the Public Service Commission and, in so doing, are improperly asking the court to review indirectly what it lacks the jurisdiction to review directly. *Stannard v Axelrod* (1979) 100 Misc 2d 702, 419 NYS2d 1012.

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PUBLIC SERVICE LAW
ARTICLE VII. SITING OF MAJOR UTILITY TRANSMISSION FACILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

NY CLS Pub Ser § 130 (2006)

§ 130. Powers of municipalities and state agencies

Notwithstanding any other provision of law, no state agency, municipality or any agency thereof may require any approval, consent, permit, certificate or other condition for the construction or operation of a major facility with respect to which an application for a certificate hereunder has been issued, other than those provided by otherwise applicable state law for the protection of employees engaged in the construction and operation of such facility, and provided that in the case of a municipality or an agency thereof, such municipality has received notice of the filing of the application therefor.

Neither the Tug Hill commission nor the Adirondack park agency shall hold public hearings for a major utility transmission facility with respect to which an application hereunder has been filed, provided that such commission or agency has received notice of the filing of such application.

HISTORY: Add, L 1970, ch 272, § 2; amd, L 1973, ch 348, § 4, L 1987, ch 362, § 5, eff July 23, 1987.

Former § 130, add, L 1924, ch 573, § 1; repealed, L 1941, ch 800, § 112, eff April 28, 1941, with substance transferred to *Rap Tr § 10*.

Closing par, amd, L 2004, ch 72, § 3, eff May 11, 2004.

NOTES:

Editor's Notes

See 1970 note under Article heading.

Research References & Practice Aids:

51 *NY Jur 2d, Eminent Domain* § 327

53A *NY Jur 2d, Energy* § 124

Part 85. GENERAL PROCEDURES

(Statutory authority:Public Service Law, §§4[1], 120, 121-a, 122[1][f], 123[1], 125, 126[1])

Historical Note

Part (§§85.1-85.15) filed July 13, 1970; renum. Subpart 85-2, filed July 13, 1984 eff. Oct. 1, 1984.

§ 85.2 [Renumbered]

Historical Note

Historical Note

Sec. filed July 13, 1970; amd. filed Jan. 19, 1971; renum. 85-2.2, filed July 13, 1984 eff. Oct. 1, 1984.

Subpart 85-2. PROCEDURES WITH RESPECT TO ALL ELECTRIC TRANSMISSION LINES AND FUEL GAS TRANSMISSION LINES 10 OR MORE MILES LONG

Historical Note

Subpart (§§85-2.1 - 85-2.16) added by renum. Part 85, filed July 13, 1984 eff. Oct. 1, 1984.

§ 85-2.1 Definitions.

Historical Note

As used in this Subchapter:

(a) The term *municipality* means a county, city, town or village in this State.

(b) The term *executive secretary* means the Executive Secretary of the Public Service Commission.

(c) The term *person* means any individual, corporation, public benefit corporation, political subdivision, governmental agency, municipality, partnership, cooperative association, trust or estate.

(d) The term *certificate* means a certificate of

environmental compatibility and public need.

(e) The term *facility* or *transmission facility* means:

(1) an electric transmission facility (including associated equipment) with a design capacity of:

(i) 125 kilovolts or more, to extend a distance of one mile or more; or

(ii) 100 kilovolts or more, but less than 125 kilovolts, to extend a distance of more than 10 miles; or

(2) a fuel gas transmission line (including associated equipment) extending a distance of 1,000 feet or more, to be used to transport fuel gas at pressures in excess of 125 pounds per square inch. The term *facility* or *transmission facility* does not include any electric transmission line located underground in a city with a population in excess of 125,000, or a primary transmission line (as such term is used in the Federal Power Act [16 U.S.C. 791 - a-828c]) approved by the Federal Power Commission in connection with a hydroelectric facility.

(f) The term *application* means the application form required by section 85-2.8 of this Subpart.

Historical Note

Sec. added by renum. 85.1, filed July 13, 1984 eff. Oct. 1, 1984.

§ 85-2.2 Materials required for filing.

Historical Note

(a) A filing for a certificate shall contain:

(1) the application;

(2) the exhibits and information required by statute and these regulations;

(3) the testimony, in written form, and exhibits which will comprise the applicant's direct case in support of its application; and

(4) any additional information which the

applicant deems necessary or desirable.

(b) At the time of filing, the applicant shall submit 10 copies thereof to the executive secretary. The commission or its staff may request additional copies of the filing at any time.

Historical Note

Sec. added by renum. 85.2, filed July 13, 1984 eff.
Oct. 1, 1984.

§ 85-2.3 Acceptance, amendment or rejection of a filing.

Historical Note

(a) A filing shall be docketed when received by the executive secretary. The commission shall fix a date for commencing a public hearing on a filing not less than 60 nor more than 90 days after it is docketed.

(b) Acceptance of a filing by the executive secretary shall not constitute a waiver of any failure to comply with the requirements of these regulations. The commission may, at any time, reject all or any part of a filing that does not conform to the requirements of these regulations.

(c) If all of the information required by these regulations is not available at the time of the filing, the applicant may petition the commission for permission to submit the unavailable information at a specified future date. Such date shall be before the date upon which the hearing is concluded. The commission may grant such a petition in whole or in part, or it may defer the matter, in whole or in part, for decision by the hearing examiner.

Historical Note

Sec. added by renum. 85.3, filed July 13, 1984 eff.
Oct. 1, 1984.

§ 85-2.4 Waiver.

Historical Note

(a) The commission may, upon the motion of any party or of staff counsel, or upon its own motion, waive one or more of the requirements of this Subpart relating to the information required in a filing for a certificate or the time within which it is to be provided.

(b) A motion to the commission under subdivision (a) of this section shall clearly state the requirement or requirements sought to be waived and the reasons therefor.

Historical Note

Sec. added by renum. 85.4, filed July 13, 1984 eff.
Oct. 1, 1984.

§ 85-2.5 Additional information.

Historical Note

(a) Upon request of the commission or the hearing examiner, the applicant shall submit such additional information as may be specified.

(b) Upon the motion of any party or of staff counsel, or upon its own motion, the commission may order an applicant to provide such additional information as the commission deems necessary or desirable. A motion to the commission under this subdivision shall clearly state the additional information sought and the reasons such information is necessary or desirable.

(c) The commission may, upon the motion of any party or of staff counsel, or upon its own motion, dismiss the filing of an applicant who fails to comply with an order to supply additional information.

(d) When a filing is set for hearing, any motion for additional information shall be addressed to the hearing examiner.

Historical Note

Sec. added by renum. 85.5, filed July 13, 1984 eff.
Oct. 1, 1984.

§ 85-2.6 Consultation with staff.

Historical Note

Applicants, other parties, and all interested groups and persons are invited and encouraged to confer on an informal basis with the staff of the commission with respect to any matter related to a filing or proposed filing. Except as expressly provided to the contrary, neither an applicant, other party, interested group or person, nor the commission staff, shall be bound by any statement made during the course of such informal consultation. The commission shall not be bound without its consent.

Historical Note

Sec. added by renum. 85.6, filed July 13, 1984 eff.
Oct. 1, 1984.

§ 85-2.7 Incorporation by reference.

Historical Note

Any party or staff counsel may move to incorporate by reference information contained in any filing with this commission, or contained in any other public document. When incorporating by reference, a party or staff counsel shall clearly identify the material to be incorporated. A party shall supply to the commission, upon request, additional copies of any material incorporated by reference.

Historical Note

Sec. added by renum. 85.7, filed July 13, 1984 eff.
Oct. 1, 1984.

§ 85-2.8 Content of application.

Historical Note

An application for a certificate shall contain:

- (a) a description of the proposed facility;
- (b) a statement of the location of the proposed site or right-of-way;
- (c) a summary and description of any studies which have been made of the environmental impact of the proposed project;
- (d) a statement explaining the need for the proposed facility;
- (e) a description of any reasonable alternate locations or routes for the proposed facility, including a description of the comparative merits and detriments of each location or route and a statement explaining why the primary location or route is best suited for the proposed facility; and
- (f) such other information as the applicant deems necessary or desirable.

Historical Note

Sec. added by renum. 85.8, filed July 13, 1984 eff.
Oct. 1, 1984.

§ 85-2.10 Notice of application.

Historical Note Case Notes

- (a) A filing shall be accompanied by proof of service of a copy of the filing on:
 - (1) each municipality in which any portion of the facility is to be located, both as primarily and alternatively proposed;
 - (2) the Commissioner of Environmental Conservation;
 - (3) the Commissioner of Commerce;
 - (4) the Commissioner of Transportation;
 - (5) the Director of the Office of Planning Coordination;
 - (6) each member of the New York State Legislature through whose district any part of the

facility, as primarily or alternatively proposed, would pass;

Oct. 1, 1984.

CASE NOTES

Electric utility's published notice of environmental compatibility and public need (EC&PN) certification process in connection with replacement and upgrading of two power lines satisfied statutory and regulatory requirements, where description of proposed routing of project was sufficiently detailed to inform public of particular lines that were being upgraded, that existing rights-of-way and easements were intended to be used, that there was a specified date on which filing was to be made and that copies of the application were available for review. *Powerline Coalition Inc. v. New York State Public Service Com'n* (3 Dept. 1998) 674 N.Y.S.2d 458, 244 A.D.2d 98, appeal dismissed 703 N.E.2d 270, 680 N.Y.S.2d 458, 92 N.Y.2d 919.

§ 85-2.11 Participation and intervention.

Historical Note

- (7) in the event any portion of the proposed facility is located within its jurisdiction, the Hudson River Valley Commission;
- (8) in the event any portion of the proposed facility is located within its jurisdiction, the St. Lawrence - Eastern Ontario Commission; and
- (9) in the event any portion of the proposed facility is located within its geographical jurisdiction, any other State agency having authority over the location of any portion of the proposed facility.
- (b) Service upon a municipality under paragraph (a)(1) of this section shall be addressed to the chief executive officer of the municipality and shall specify the date on or about which the filing is to be made.
- (c) A filing shall be accompanied by a statement of the notice of the filing given to persons residing in municipalities on whom a copy of the filing is required to be served under paragraph (a)(1) of this section. An applicant shall, as minimum notice under this subdivision, publish once a week for two consecutive weeks prior to the filing, in a newspaper or newspapers of general circulation in all the areas through which the facility would pass, both as primarily and alternatively proposed:
- (1) a brief description of the proposed facility;
 - (2) the location of the proposed right-of-way; and
 - (3) the date on or about which the filing will be made.
- (d) The executive secretary shall serve the applicant with a list of those persons who, in addition to those listed in subdivision (a) of this section, have become parties to the proceeding as provided in section 85-2.11(b)(2) of this Subpart. The applicant shall, within 10 days of the date of service of said list, serve a copy of the filing on each such person, and file proof of service thereof with the commission.

Historical Note

Sec. added by renum. 85.10, filed July 13, 1984 eff.

- (a) The parties to a certification proceeding shall include the applicant and such of the following as make timely application for participation:

- (1) the Commissioner of Environmental Conservation;
- (2) the Commissioner of Commerce;
- (3) the Director of the Office of Planning Coordination;
- (4) where any portion of the facility or of any alternate is to be located within its jurisdiction, the Hudson River Valley Commission;
- (5) where any portion of the facility or of any alternate is to be located within its jurisdiction, the St. Lawrence - Eastern Ontario Commission;
- (6) any municipality entitled to receive notice under section 85-2.10(a)(1) of this Subpart;

(7) any individual resident in a municipality entitled to receive notice under section 85-2.10

(a)(1) of this Subpart; and

(8) any domestic nonprofit corporation or association, formed in whole or in part (i) to promote conservation or natural beauty, (ii) to protect the environment, personal health or other biological values, (iii) to preserve historical sites, (iv) to promote consumer interest, (v) to represent the interests of commercial and industrial groups, or (vi) to promote the orderly development of the areas in which the facility is to be located.

(b)

(1) A person or organization listed in paragraphs (a)(1)-(5) of this section may participate in a certification proceeding by filing a notice of intent with the executive secretary at least five days prior to the date of the first scheduled hearing in the proceeding.

(2) A party listed in paragraphs (a)(6)-(8) of this section may participate in a certification proceeding by filing with the executive secretary a notice of intent to be a party within 30 days after the date given in the published notice as the date of filing.

(c) In its notice of intent to be a party, a person or organization should state its name, address, telephone number, the name of its attorney or qualified representative upon whom service should be made, and the basis upon which it claims to be a party.

(d)

(1) Any person or organization may petition the commission to intervene in a certification proceeding within the time specified in paragraph (b)(2) of this section, and may be allowed by the hearing examiner to participate in the proceedings if such person or organization has an interest in the proceedings, or if his participation would contribute to the appropriate resolution of the proceeding. That petition should state the name, address, telephone number, the name of the attorney or qualified representative upon whom service should be made, and the interest of the intervenor in the proceeding, and the reason for intervention. A petition for intervention shall be served upon all parties specified in paragraphs

(a)(1)-(7) of this section, the executive secretary and staff counsel.

(2) Any party to the proceeding, or staff counsel, may file an answer to a petition to intervene within 10 days after the date of service of the petition. Any objection to intervention may also be made to the examiner at the first hearing. Replies to such objections may be filed with the executive secretary only if the commission so requests, or if requested or allowed by the hearing examiner.

(e) Any person who fails to comply with subdivision (b) of this section may petition for late intervention. If the hearing examiner has not issued his proposed report, such petitions shall be addressed to him. Denial of a petition for late intervention may be appealed within 10 days to the commission. After service of the hearing examiner's report, such petitions shall be addressed to the commission.

(f) The commission or hearing examiner may condition the granting of a petition for intervention or late intervention upon such terms as are just and necessary.

Historical Note

Sec. added by renum. 85.11, filed July 13, 1984 eff. Oct. 1, 1984.

§ 85-2.12 Service of documents.

Historical Note

(a) Because many of those who participate in a certification proceeding may have only a limited or special interest in that proceeding, and because the service of all documents in a proceeding upon all parties is both expensive and difficult, each party (except the applicant) at the time of (1) filing a notice of intent to become a party, (2) petition for intervention, or (3) first appearance, as the case may be, shall state whether he desires to be served with all documents in the proceeding or only documents related to certain subject topics. Unless a party or intervenor otherwise requests, he shall be placed on

the executive secretary's service list.

(b) Briefs to the hearing examiner, unless he rules otherwise, shall be served on all parties, and briefs addressed to the commission shall be served on all parties. Unless the hearing examiner rules otherwise, other pleadings and documents shall be served only on parties directly affected or requesting them as provided in subdivision (a) of this section.

(c) Any party or staff counsel may, by motion to the hearing examiner, challenge the need of any party for all filings in the proceeding. An adverse ruling by the hearing examiner may be appealed to the commission within 10 days. Pending the determination of such appeal, the party whose need for all filings is contested shall receive all filings.

Historical Note

Sec. added by renum 85.12, filed July 13, 1984 eff.
Oct. 1, 1984.

§ 85-2.13 Consideration of issues.

Historical Note

(a) Upon the motion of any party or of staff counsel, or upon its own motion, the commission may provide that any issue or issues raised by a filing be severed from other issues and decided separately. When an application has been set for hearing, such motion shall be addressed to the hearing examiner.

Historical Note

Sec. added by renum. 85.13, filed July 13, 1984 eff.
Oct. 1, 1984.

§ 85-2.14 Grouping of parties.

Historical Note

(a) Where it appears desirable, the commission or hearing examiner may provide for the grouping of parties with similar interests. If such a group does not

designate an agent for the service of notice and documents, the hearing examiner may designate such an agent. Notice and documents need be served only on the designated agent.

(b) Where there are two or more parties or groups having substantially similar interests, the commission or hearing examiner may limit the number of attorneys who will be permitted to participate actively in the proceedings on behalf of such parties or groups.

(c) Notwithstanding subdivisions (a) and (b) of this section, any party to a proceeding shall have the right to file a written brief with the commission or hearing examiner.

Historical Note

Sec. added by renum. 85.14, filed July 13, 1984 eff.
Oct. 1, 1984.

§ 85-2.15 Dismissal of an application.

Historical Note

Whenever it shall appear that the statutory requirements for a certificate cannot be met, the commission may dismiss the application and terminate the proceedings upon the motion of any party or staff counsel, or upon its own motion.

Historical Note

Sec. added by renum. 85.15, filed July 13, 1984 eff.
Oct. 1, 1984.

§ 85-2.16 Noncontested proceedings.

Historical Note

(a)

(1) Upon the motion of any applicant, the commission may, where it appears to be in the public interest, order that the public hearing

required by section 123 of the Public Service Law on an application for a certificate for an underground transmission facility or for an overhead transmission facility to be constructed on substantially the same right-of-way as an existing facility that is to be replaced be held before the commission on the application, exhibits, prepared testimony, and any other information filed by the applicant and any prepared testimony, information, or papers filed by any party or staff counsel, without oral testimony.

(2) A motion by an applicant for an expedited proceeding under paragraph (1) of this subdivision, shall be made at the time it files its application for a certificate or within 20 days thereafter. The applicant shall serve a copy of the motion for an expedited proceeding and the public notice required by paragraph (3) of this subdivision on each person or municipality entitled to service of a copy of the filing under section 85-2.10 of this Subpart.

(3) Not less than 30 nor more than 40 days after the date on which it files its application for a certificate, an applicant moving under paragraph (1) of this subdivision shall publish in a newspaper or newspapers of general circulation, in all the areas traversed by the proposed facility, a notice:

(i) briefly describing the proposed facility and the location of the proposed right-of-way;

(ii) stating that the applicant has moved that the public hearing required by section 123 of the Public Service Law be held before the commission on the basis of application, exhibits, prepared testimony, and any other information filed by any party or staff counsel, and that oral testimony not be taken; and

(iii) stating that any person opposed to the granting of the certificate should, within 10 days of the date of the publication of the notice, notify in writing the Executive Secretary of the Public Service Commission at 44 Holland Avenue, Albany, N.Y. 12208, of the reasons for his opposition.

(4) An applicant moving under paragraph (1) of this subdivision shall file any written consent required under paragraph (b)(3) of this section

within 45 days of the date on which the applicant filed its application for a certificate. An applicant who fails to comply with this requirement shall be deemed to have withdrawn its motion for an expedited proceeding.

(b) The commission may grant a motion made under subdivision (a) of this section if:

(1) the applicant has served a copy of its motion and the public notice required upon each person, municipality and agency entitled to service under section 85-2.10 (a) of this Subpart;

(2) no person, municipality or agency has filed with the executive secretary, within 10 days of the date of publication of the newspaper notice required by paragraph (a)(3) of this section, a written objection stating substantive reasons for opposition to the granting of such a motion; and

(3) no person or domestic nonprofit corporation or association entitled to become a party to the proceeding, under paragraphs (a)(7)-(8) of section 85-2.11 of this Subpart, has made timely application for participation, or, in the event one or more such persons, corporations or associations has been granted participation, each such person, corporation or association has consented in writing to the granting of the applicant's motion.

(c) If, at the hearing provided by subdivision (a) of this section, the commission finds that there is a substantive basis for opposition to the granting of the certificate, it shall order that the matter be set for further hearings in accordance with this Part.

Historical Note

Sec. added by renum. 85.16, filed July 13, 1984 eff. Oct. 1, 1984.

Part 86. GENERAL EXHIBITS

(Statutory authority:Public Service Law, art. VII)

Historical Note

Part (§§86.1-86.10) filed July 13, 1970; amd. filed July 13, 1984 eff. Oct. 1, 1984. Amended Part title.

§ 86.1 General requirements.

Historical Note

Each exhibit shall contain:

- (a) a title page showing:
 - (1) the applicant's name;
 - (2) the title of the exhibit; and
 - (3) the proper designation of the exhibit; and
- (b) if consisting of 10 or more pages, a table of contents citing, by page and section number or subdivision, the component elements or matters contained in the exhibit.

Historical Note

Sec. filed July 13, 1970.

§ 86.2 Exhibit 1: general information regarding application.

Historical Note

- (a) A corporate applicant shall state:
 - (1) name;
 - (2) address;
 - (3) telephone number; and
 - (4) the name and business address of the principal officer of the applicant.
- (b) A noncorporate applicant shall provide

information similar or equivalent to the information required of a corporate applicant under subdivision (a) of this section.

- (c) If the applicant desires service of a document or other correspondence upon an agent, Exhibit I shall so state, giving the name, address and telephone number of the agent for service.

Historical Note

Sec. filed July 13, 1970.

§ 86.3 Exhibit 2: location of facilities.

Historical Note

- (a) The applicant shall submit detailed maps, drawings and explanations showing the right-of-way for each proposed facility. Such maps, drawings and explanations shall include:

- (1) New York State Department of Transportation maps (1:24,000 topographic edition), showing:

- (i) the proposed right-of-way (with control points indicated), covering an area of at least five miles on either side of the proposed facility location;

- (ii) where the construction or reconstruction of the proposed facility would necessitate permanent clearing or other changes to the topography, vegetation or man-made structures.

- (iii) any known archaeological, geologic, historical or scenic area, park or untouched wilderness on or within three miles of the right-of-way;

- (2) New York State Department of Transportation maps (scale 1:250,000) showing the relationship of the proposed facility to the applicant's overall system with respect to:

- (i) the location, length and capacity of the proposed facility, and of any existing facility related to the proposed facility;

(ii) the location and function of any structure to be built on, or adjacent to, the right-of-way;

(iii) the location and designation of each point of connection between an existing and proposed facility; and

(iv) nearby, crossing or connecting rights-of-way or facilities of other utilities.

(b)

(1) The applicant shall submit black-and-white or color aerial photographs of such coverage to show at least 1,200 feet on each side of the proposed right-of-way, and of such scale and detail to enable discrimination and identification of all natural and cultural features. Such aerial photographs shall include overlays:

(i) clearly identifying the proposed right-of-way;

(ii) showing where the construction of the proposed facility would necessitate permanent clearing or other changes to the topography, vegetation or man-made structures;

(iii) showing the location of access and maintenance routes; and

(iv) showing the location of the facility on the right-of-way.

(2) Aerial photographs shall reflect the current situation. Aerial photographs of urban areas and urbanizing fringe areas shall be taken within six months of the date of filing. All aerial photographs shall indicate by whom and on what date the photographs were taken.

Historical Note

Sec. filed July 13, 1970.

§ 86.4 Exhibit 3: alternatives.

Historical Note

(a) The applicant shall submit a statement explaining

what consideration, if any, was given to:

(1) any alternative route;

(2) the expansion of any existing right-of-way of the applicant or of another;

(3) any alternate method which would fulfill the energy requirements with comparable costs. Such statement shall include the comparative advantages and disadvantages of any alternative considered.

(b) The applicant shall, on New York State Department of Transportation maps, indicate any alternative route considered.

Historical Note

Sec. filed July 13, 1970.

§ 86.5 Exhibit 4: environmental impact.

Historical Note

(a) The applicant shall submit a statement describing any study which has been made of the impact of the proposed facility on the environment. That statement shall include a description of the methods employed in making that study and a summary of its findings.

(b) The applicant shall state:

(1) what changes, if any, the construction and operation of the proposed facility might induce in the physical or biological processes of plant life or wildlife through any permanent or significant temporary change in the hydrology, topography or soil of the area;

(2) what efforts, if any, have been made to assure:

(i) that any right-of-way avoids scenic, recreational and historic areas;

(ii) that any right-of-way will be routed to minimize its visibility from areas of public view;

(iii) that any right-of-way has been planned to avoid heavily timbered areas, high points,

ridge lines and steep slopes; and

(iv) that the selection of any proposed right-of-way preserves the natural landscape and minimizes conflict with any present or future planned land use;

(3) what, if any, plans have been formulated to keep any right-of-way clearing to the minimum width necessary to prevent interference of vegetation with the proposed facility;

(4) what, if any, schedule or method of clearing the right-of-way has been formulated to take into account soil stability, protection of natural vegetation, and the protection of adjacent resources (including the protection of any natural habitat for wildlife);

(5) what, if any, plans have been made to protect vegetation and topsoil not cleared, from damage from construction and operation of the facility;

(6) what, if any, provision has been made to protect fish and other aquatic life from harm from the use of explosives or pollutants in or near streams and other bodies of water;

(7) what, if any, pesticide or herbicide will be used in construction or maintenance of the proposed facility (including the volumes and manner of use);

(8) what, if any, plans have been made to locate and design appurtenant structures to minimize the environmental impact of the structures (including visual and noise disturbance); and

(9) what, if any, provisions have been made for cleanup and restoration of the project area after construction.

(c)

(1) If any portion of the proposed facility is to be constructed underground, the applicant shall state what, if any, provisions have been made to avoid clearance of the entire right-of-way. If the clearance proposed will go to the mineral soil, the applicant shall state:

(i) the width of the clearance;

(ii) what, if any, provisions have been made

for the replacement of topsoil removal during construction;

(iii) what, if any, provisions have been made for removing excess soil excavated during construction; and

(iv) what, if any, plans have been made for stabilizing the cleared area with vegetation and erosion control devices.

(2) If any underground portion of the proposed facility will be constructed in or adjacent to a stream or other body of water, the applicant shall state:

(i) what, if any, plans have been made to prevent erosion of the banks;

(ii) what, if any, techniques (such as cofferdams) will be used; and

(iii) what, if any, plans have been made to use the water from such streams or other bodies of water for pipe-testing or other purposes (including volumes of water involved and methods for release of water once used).

Historical Note

Sec. filed July 13, 1970.

§ 86.6 Exhibit 5: design drawings.

Historical Note

The applicant shall submit design, profile and architectural drawings and descriptions of the proposed facility. Such drawings and descriptions shall include:

(a) the length, width and height of any structure;

(b) the material of construction, color and finish; and

(c) a profile of the centerline of the right-of-way at exaggerated vertical scale.

Historical Note

Sec. filed July 13, 1970.

§ 86.7 Exhibit 6: economic effects of proposed facility.

Historical Note

The applicant shall submit a statement describing any anticipated effects the construction or operation of the proposed facility may induce in the residential, commercial or industrial land-use patterns of any area adjacent to any portion of the proposed facility.

Historical Note

Sec. filed July 13, 1970.

§ 86.8 Exhibit 7: local ordinances.

Historical Note

The applicant shall submit a list of local ordinances applicable to the proposed facility, specifying any which the applicant deems unduly restrictive. If the applicant desires a waiver from compliance with any such local ordinance, it shall submit a statement justifying the request.

Historical Note

Sec. filed July 13, 1970.

§ 86.9 Exhibit 8: other pending filings.

Historical Note

The applicant shall state whether it has pending, or knows of others who have pending, with this commission or with any other governmental department or agency (State or Federal), an application or filing which concerns the subject matter of the proceeding before the commission. If one or more such applications or filings is pending, the applicant shall state, for each application

or filing pending, whether the granting of any such other application or filing will have any effect on the grant or denial of a certificate, and whether the granting of a certificate will have any effect upon the grant or denial of any such other application or filing.

Historical Note

Sec. filed July 13, 1970.

§ 86.10 Exhibit 9: cost of proposed facility.

Historical Note

(a) The applicant shall provide a detailed estimate of the total capital costs of the proposed facilities covered by the application. The estimate shall show the estimated cost of:

- (1) right-of-way;
- (2) surveys;
- (3) materials;
- (4) labor;
- (5) engineering and inspection;
- (6) administrative overhead;
- (7) fees for legal and other services;
- (8) interest during construction; and
- (9) contingencies.

(b)

(1) The applicant shall include a brief statement of the source of the information used as the basis for the estimates required by subdivision (a) of this section.

(2) If not stated elsewhere, the applicant shall include data on preliminary bids, if any, for the proposed facilities, and recent experience cost data for similar facilities.

(c) Upon the demand of any party or of staff counsel, the applicant shall supply the work papers from which the estimates required by subdivision (a) of

this section were made.

Historical Note

Sec. filed July 13, 1970.

Part 88. EXHIBITS FOR ELECTRIC TRANSMISSION FILINGS

(Statutory authority:Public Service Law, art. VII)

Historical Note

Part (§§88.1-88.6) filed July 13, 1970.

§ 88.1 Exhibit E-1: description of proposed transmission line.

Historical Note

The applicant shall submit a detailed description of the proposed transmission line. Such description shall include:

- (a) the design voltage and voltage of initial operation;
- (b) the type, size, number and materials of conductors;
- (c) insulator design;
- (d) the length of the transmission line;
- (e) the construction materials of the towers; and
- (f) the design standards for each type of tower and tower foundation.

Historical Note

Sec. filed July 13, 1970.

§ 88.2 Exhibit E-2: other facilities.

Historical Note

- (a) The applicant shall explain the necessity for any

proposed switching station or substation, and shall furnish a description of the equipment to be installed in any such station.

- (b) The applicant shall furnish details of any terminal facility which is to be a part of the proposed transmission line.

Historical Note

Sec. filed July 13, 1970.

§ 88.3 Exhibit E-3: underground construction.

Historical Note

If any portion of the proposed transmission line is to be built underground, the applicant shall:

- (a) indicate the type of cable system to be used;
- (b) provide the design standards for that system;
- (c) indicate the number and size of conductors to be used; and
- (d) indicate, on a profile of the line:
 - (1) the depth of the cable; and
 - (2) the location of oil pumping stations and manholes.

Historical Note

Sec. filed July 13, 1970.

§ 88.4 Exhibit E-4: engineering justification.

Historical Note

- (a) The applicant shall:
 - (1) provide the engineering justification for the proposed transmission line, showing its relation to the existing facilities of the applicant and the interconnected network;

(2) indicate specific benefits with respect to reliability and economy to the applicant and the interconnected network;

(3) state the proposed date for completion of the line and indicate the impact on the systems of the applicant and others of failure to complete the proposed transmission line on such date; and

(4) provide appropriate system studies, showing expected flows on the line under normal, peak and emergency conditions, including effects on stability of the interconnected system.

Historical Note

Sec. filed July 13, 1970.

§ 88.5 Exhibit E-5: effect on communications.

Historical Note

The applicant shall submit a statement describing the anticipated effects of the proposed line and related facilities on television, radio and other communications systems.

Historical Note

Sec. filed July 13, 1970.

§ 88.6 Exhibit E-6: effect on transportation.

Historical Note

The applicant shall submit a statement describing the anticipated effects of the proposed line and related facilities on airports, railroads and other transportation systems.

Historical Note

Sec. filed July 13, 1970.